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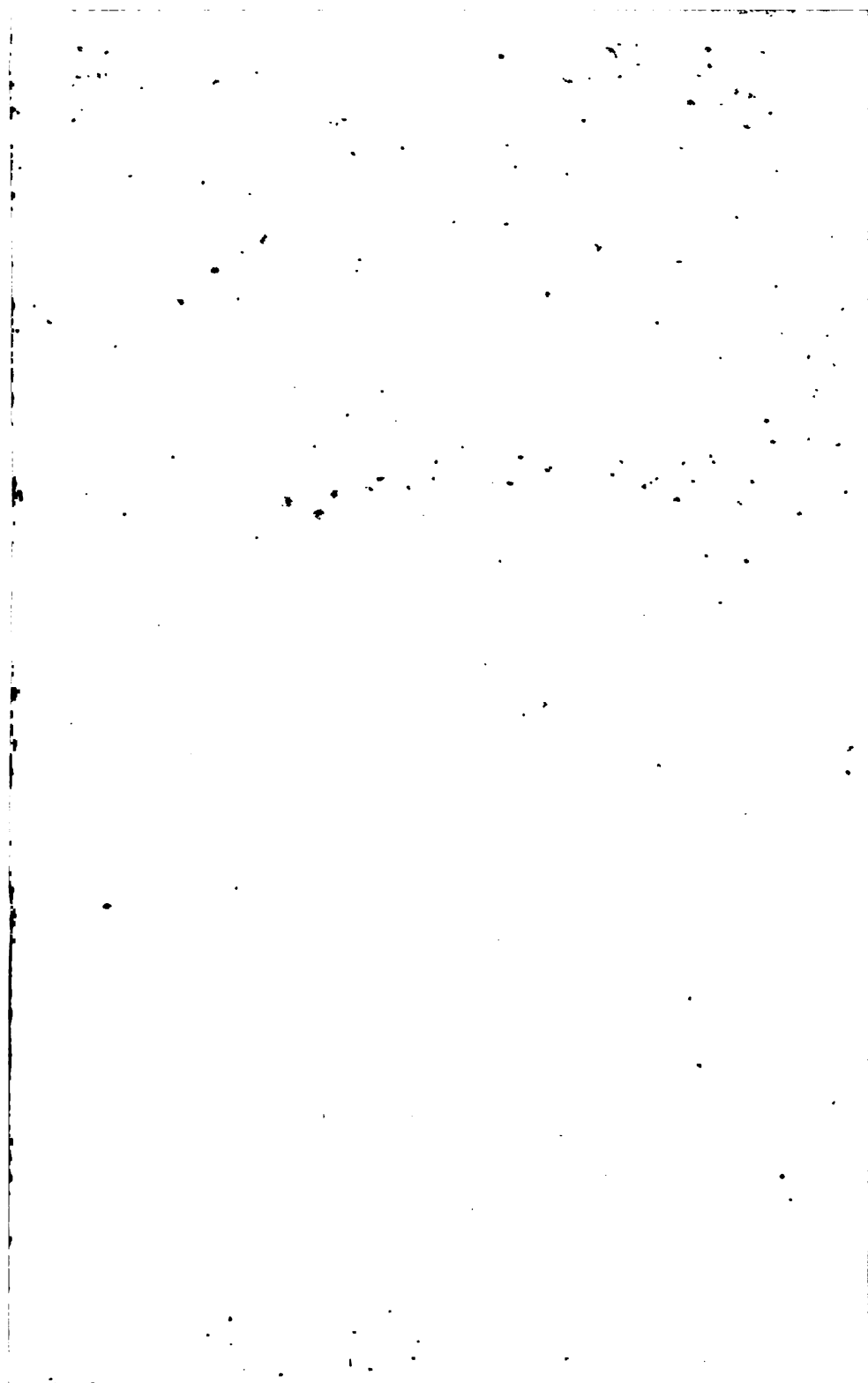
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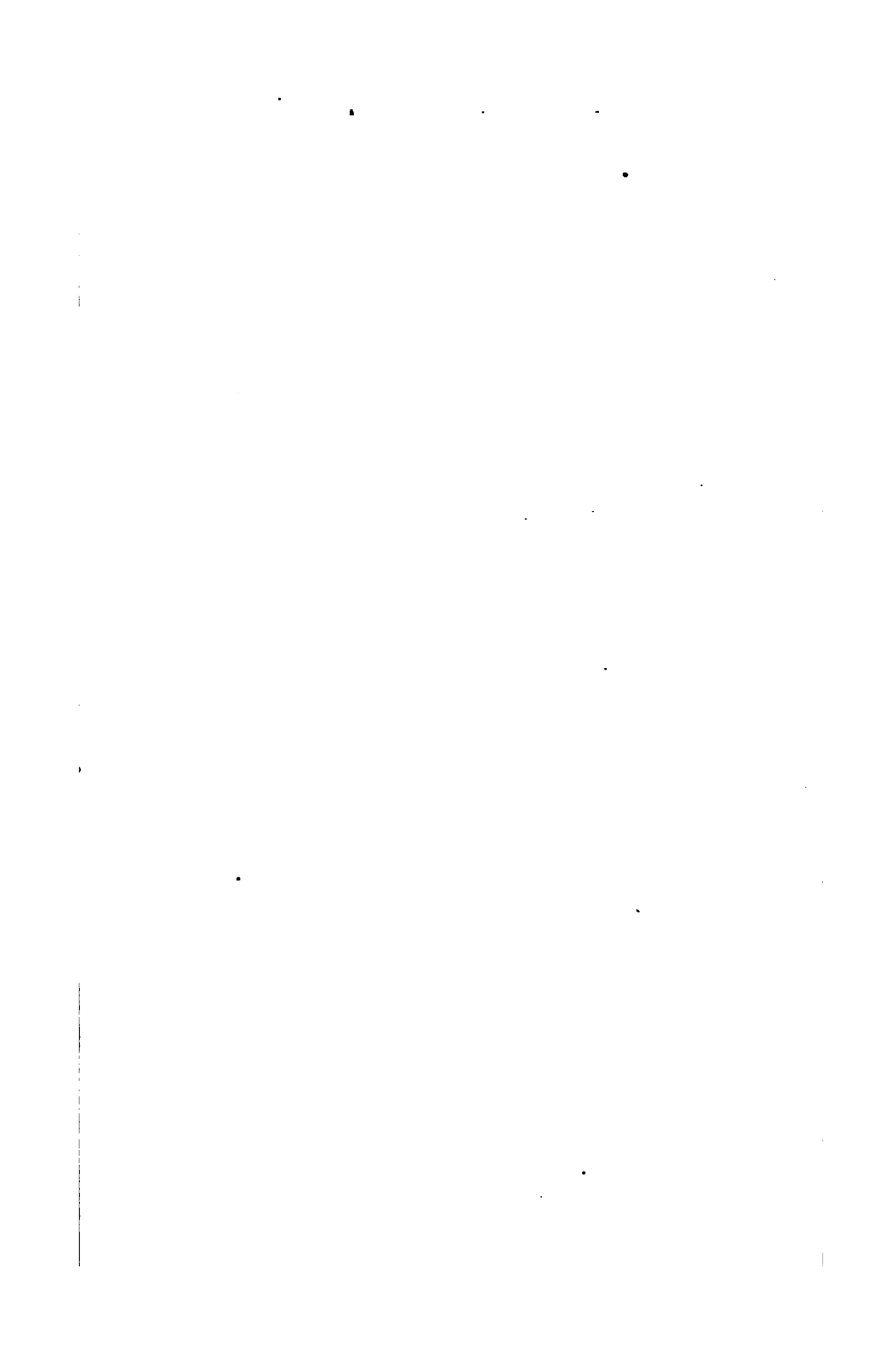
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THE
Law Magazine and Law Review:
OR,
QUARTERLY JOURNAL OF JURISPRUDENCE.

No. XI.

ART. I.—LEGAL EDUCATION:

AS the subject of Legal Education will, during the ensuing year, engross the attention of a committee delegated by the Four Inns of Court, for the express purpose of investigating it, the moment seems opportune for recalling to it the attention of our readers, and for offering some hints towards improving the system now in operation, and instilling into it more vitality and energy.

Much has been said, and somewhat written, during the preceding six or seven years, in regard mainly to three points connected with the matter before us, whence we think a good deal may be extracted, calculated to aid the learned delegates in accomplishing satisfactorily for their constituencies the task, delicate and difficult though it may be, which, according to report, has been confided to them.

It seems generally conceded—First, that a sound and systematic course of education should be provided for students. Secondly, that it should be organised and superintended rather by the Inns of Court themselves than by any professorial body, nominated by the Crown, or otherwise, wholly independent of them. Thirdly, that it should not be left to the mere volition

of the student, whether he will or will not subject himself to the curriculum provided.

With reference to the first of the above three points, the working of the Educational Scheme, instituted and set a-going in the autumn of 1852, shows that very little need be superadded to the legal *pabulum*, upon which the student for the bar may now pasture his intellect and recruit his mind. Within the limits of the five departments of Equity, Common Law, Conveyancing and Real Property, History and Constitutional Law, and Roman Law, must assuredly be included every topic or branch of knowledge which legal seminaries are specially bound to teach, or practitioners in our Courts bound in their strictly professional capacity to know. True, it may be urged, and will be admitted, that no kind of knowledge is useless to the barrister; that the more highly his mind is cultivated, and the more fully it is stored with scientific lore, the better will it be for himself and for his clients. Such a remark, however, if hazarded, would be irrelevant to the issue now presented, which is this:—Are the Four Inns under any sort of obligation—whether recognising that the execution of a solemn trust has, in days gone by, been delegated to them or not—to enable students enrolled amongst them to fit themselves by the acquisition of other than purely professional knowledge for the performance of forensic duties? We hold that they are not; and, accordingly, that the five leading departments of learning already specified, comprise within their limits every subject to which the attention of a student for the bar ought, during his noviciate, to be specially and peculiarly directed.

But although the general scope of the lectures now delivered at the Inns of Court be amply wide enough, and the range of subjects discussed by each professor be sufficiently extended to satisfy the cravings of even the most exigent spirit, we yet think that much benefit would accrue to the student, and much more fruit would be matured by the educational system, if the under-mentioned suggestions were acted on.

Let it be remembered that one grave complaint alleged against the system is, that from the working of its somewhat complicated and expensive machinery, small and inadequate results ensue—

that the number of students substantially benefited by its operation is comparatively few. That with the motive power at command, the product is scanty and insufficient. We do not now pause to inquire whether this complaint be indeed well-founded; suffice it to say, that eminent members of the bar have put it forward—we have ourselves heard it alleged pointedly and without reserve; and assuming for the moment that it is not altogether causeless, we would indicate, with a view to their future rectification, certain deficiencies of the existing system.

Legal education, to be efficient for the end proposed, must be *thorough*—it must be energetically and vigorously conducted—with singleness of purpose, and without stint of time or trouble. These conditions being indispensable, no mere routine attendance at classes or at lectures will be enough to enable the pupil to grasp the principles of law—no mere routine delivery of lectures, or even the analysing and expounding of cases to his class, will enable the teacher to accomplish that amount of good which, if really competent to the discharge of his duties, and conscientiously resolved to perform them, he might readily effect.

What is wanting then is this—that the time of the legal professor should be more fully devoted to the sole and exclusive end of teaching law than it now is—that he should be brought into more immediate and constant communication with the students who attend his readings than he actually is—that those from amongst the class who want difficulties explained, or reasonable questions answered, should have free access to the teacher, and opportunities, more ample than at present allowed, of conferring with him.

On reference to the organic rules upon which the existing system is founded, and to the printed cards of the lectures and private classes, we find that each of the five readers is required to devote thrice a week during the educational term two hours of his day to the teaching of his class, and likewise to deliver in the whole twenty-seven (recently reduced to twenty-five) public lectures during the educational year. Each of these public lectures in fact occupies about one hour in its delivery; and according to the scheme originally propounded—though in this particular not acted upon—the hour immediately following each

public lecture was to have been devoted to a discussion betwixt the students and the professor respecting points of difficulty mooted in it, or at all events to the solution of queries arising on it put by the former to the latter. Doubtless the students attending the public lectures have always been entitled thus to occupy their own time and that of the reader during the hour following on the close of each public lecture; but in point of fact they have not availed themselves of the privilege thus conceded to them, and questions bearing upon the topics handled at the lecture have very rarely, so far as we can ascertain, been put at its conclusion to the reader. The public lectures consequently in each department during the Legal Term have thus far been restricted to the reading of written theses prepared by the professor, in accordance with a programme previously sanctioned by the Council—notes being taken of each lecture during its delivery by such of its hearers as may be industriously inclined.

Thus far then it would seem that under the existing system of Legal Education too scanty opportunities are offered for, or at all events too little time is occupied in, that sort of familiar communication between the professor and the student which may well aid a learner in mastering those preliminary difficulties which beset his path, and sometimes block up the avenues to success.

At the private classes much of course may be, and we believe actually is, done towards clearing away such difficulties, and dispelling the perplexities which present themselves. Every teacher of experience, however, must be well aware, that in a class consisting perchance of from ten to five-and-twenty individuals, the relevancy of questions put must be somewhat strictly scrutinized, and that care in this respect must systematically be exercised, lest the time of all be recklessly sacrificed in ministering to and alleviating the ignorance of one. To the individual student whom we are supposing to be thus afflicted with doubts or ignorance, opportunities of access to the reader, with a view to the dispelling of those doubts and the clearing away of that ignorance, should, in our opinion, *out of class hours* be afforded.

But further—the system of class instruction projected by the

joint delegates of the Inns of Court, and sanctioned by the constituent bodies, however excellent in other respects, has, we apprehend, been in one particular defective. To render this system efficient, private examinations, conducted by means of printed questions, should from time to time be held. These examinations should be conducted exclusively by the professor, the answers to the questions set should be perused by him, and, above all things, he should be required, *out of class hours*, to hold converse respecting them with the students. Having ourselves been somewhat conversant with private tuition conducted at chambers for the bar, we can venture to affirm that no plan better than this can be devised for fixing in the student's mind a perception of the leading principles of Law, and for showing errors to be avoided, rocks, and snares, and pitfalls to be 'scaped.

Whilst writing the preceding lines we have been informed that, in fact, papers such as we are now recommending have occasionally been set by one or two of the readers at their private classes, but this practice has not, to the best of our knowledge, been regularly carried out, nor in reason could those learned persons, under the existing system, be expected to incur the expense, trivial though that might possibly be, and the labour and sacrifice of time—which would unquestionably be great—to be entailed by such a course of examination.

The holding of moots we further deem calculated to work much good amongst the students. A habit of discussing legal questions, of citing and tersely dealing with decided cases, *must* be got sooner or later by every proficient at the bar. Why then should not facilities for acquiring this habit be afforded by the Inns of Court for their alumni? Why should intelligent and willing students be remitted to debating societies, there to acquire a habit which may more properly and more methodically be fostered in our legal colleges? Over these discussions, conducted as we know they would be with due order and decorum, the readers might—each respectively assisting in his own department—efficiently preside. It is well known that the moots held, under the able surveillance of Mr. W. D. Lewis, at Gray's Inn, were signally successful. Discussions on a more limited scale have on several occasions been held in the Inner Temple Hall—

the questions having been selected by the reader on Common Law—which have proved useful to the students, and have excited more than ordinary interest amongst them. No practical difficulty, indeed, offers itself to the carrying out of this suggestion, although in order that moots may not interfere with the regular course of lectures and of class instruction—and we conceive that they ought not to do so—some additional inroad on the reader's leisure must thus necessarily be made.

Reverting to what we just now said—that legal education, to be good for any thing, must be *thorough*—and insisting as we do with much confidence on the advantages which would result from adopting energetically the suggestions which have latterly been made, we are impelled to this conclusion, that virtually the whole time of the readers will not more than suffice for the full and complete discharge of their duties, and that the Inns of Court must, in revising the present system of legal education, keep the attainment of this object prominently in view.

That the professorial engagements of the readers must and do seriously and fatally interfere with their professional pursuits, will be conceded by any one who glances for a few moments at the programmes of lectures and private classes issued under direction of the council of legal education during the six preceding years. To advert to one fact only indicated thereby, it will be found that during all those portions of the year, whether in term or out of term, productive of town business to the practitioner, the reader on Common Law has been engaged during the hours following: viz., on the Monday, from two to three o'clock in the delivery of a public lecture; and on Tuesdays, Thursdays, and Saturdays, from a quarter to twelve until a quarter to two, with his private class—nearly the entire morning of each of these four days, antecedent to the class or lecture, being occupied in the necessary preparation for its delivery—in the selection of books and looking up of cases meant to be read or expounded to his class. Of course, with occupations thus possessing themselves, so often weekly, of the very prime of the day usually devoted to Court business, professional engagements must be either declined or—which would be infinitely bad—neglected. The former of these alternatives has, we presume, to be adopted.

Unless then the holding of classes and delivery of lectures exclusively in the evening be feasible, it is to us manifest that the time of the readers, even when *wholly* given up to the performance of their duties, will but adequately suffice for it. Would it then be judicious to attempt the carrying out of a systematic course of instruction for the bar by means of *evening* classes or *evening* lectures, partially or exclusively? We are convinced that any attempt to do so would be futile and ineffective. This plan has ere now been tried in one at least of the five departments which compose the existing curriculum of legal education, and, as we have been informed on the very best authority, entirely and absolutely failed. The reasons why it failed must be patent after a moment's thought. The habit of residing in the Inns of Court, where their studies are prosecuted, has been abandoned by the great majority of those now preparing themselves for the bar. We do not apprehend that this habit is likely to revive—the instincts of the existing generation are opposed to the monastic seclusion of a *troisième* in Pump or Fig-Tree Court; the march of civilization has been mainly westwards, and in the particular instance specified we should not wish to check its progress. In order that legal education may be effective in working out the ends proposed, much *private reading* and reflection, much quiet thought respecting principles, and much patient examination and comparison of reported cases are essential; and what portion of the day is so well suited as the evening for the kind of mental exercise which we indicate? Admitting, however, that upon this point a difference of opinion may exist, all, we imagine, will concede that much midnight oil must be consumed ere even a moderate degree of proficiency in legal learning can be gained.

Setting aside, therefore, the idea of evening lectures and evening classes as inadmissible, we revert to the conclusion already intimated, that in revising the existing resolutions upon which the system of education in our English law colleges is founded, care must be taken to secure more completely than has hitherto been done the time of each of the readers, so that *professional* may be made altogether subordinate to *professorial* engagements. Let us say at once and undisguisedly that the two species of employment are incompatible—not theoretically, but practically;

and that, although it may be very plausible to affirm that he who best practises can best teach, it would be absurd to apply this dictum in any wise to a profession where he who would teach efficiently must virtually debar himself from practising, and where he who best practises would certainly not find it worth his while to teach.

The second of the three propositions which we venture to regard as generally conceded, is this :—that the system of education for the bar should rather be organised and superintended by the Inns of Court than by any professorial body—whether nominated by the government or otherwise—wholly independent of them.

The point involved in the above proposition we do not deem it necessary at all to labour. Each of our Inns of Court is presided over by a body of men comprising within it accomplished lawyers and profound thinkers upon many of the varied and difficult subjects embraced within the ample folds of “Jurisprudence”—a word, we may observe in passing, to which dissimilar senses have been ascribed, but which we would now be understood to use as synonymous with “Legal Science.” From amongst this large body of talented and distinguished men, amounting, as the Law List informs us, to nearly two hundred, surely it will never be matter of much difficulty to select some few willing to take upon themselves the special task of superintending the conduct of legal studies, supervising the programmes of the readers, and giving their countenance and authority to the examinations held at stated periods for testing the proficiency of the students. That the Council of Legal Education, presided over by the learned ex-attorney-general, Sir Richard Bethell, has hitherto most efficiently performed the duties briefly above indicated, no one at all conversant with the course of proceeding at the examinations for the bar; held thrice yearly at Lincoln’s Inn, will, we think, venture to deny; and whatsoever modifications may hereafter be introduced into the present educational system, there can be no doubt that the learned bodies who have organised, and up to this time maintained it, will continue satisfactorily to regulate its working. Certainly we are by no means anxious to witness any legislative tinkering with our Inns of Court: being admittedly competent to

train and educate their respective students, and having evinced by overt acts their willingness to undertake the office, it seems superfluous that any other body—no matter how constituted, or by whom appointed—should be brought into existence, and with a view but to effecting the self-same end. Even should the Four Inns at some future day be erected into a corporation, and should a law university be founded in conformity with the suggestions of the commissioners, we see nothing likely to result from those changes which could in any the minutest degree affect the conclusions above arrived at. Granted that the university is established, and a collegiate scheme successfully developed, which might combine together the Inns of Court for purposes of education and discipline, leaving otherwise undisturbed their individuality, does it therefore follow that the professorial chairs in this university are to be filled by nominees of the Crown, or by those who may not antecedently have owed allegiance to *Alma Mater*, or are unsympathetic with her customs and traditions?

We agree with the remarks of Mr. Buckle—to be found in his learned, elaborate, and highly philosophical essay, with which the leisure hours of our vacation rambles have been solaced—that science will best, most vigorously, thrive when unaided by the patronage of kings, and unendowed by state or government benefactions. The spirit of this remark justifies its application to the legal at least as much as to any other science; and we think that there are cogent reasons which the reader of history will surmise, warranting the jealousy which we should feel if aught occurred savouring of interference by the Crown with the privileges or independence of our Inns of Court.

Let us pass on, then, to a brief consideration of the last and most difficult to be dealt with of the three propositions, which we believe to be generally accepted amongst the heads of the profession and established—that it should not be left to the mere volition of the student whether he will or will not subject himself to the curriculum offered by the Inns of Court. Under the existing system of legal education it is well known to our readers, that a choice is conceded to the student of obtaining access to the bar, either by attendance at the public lectures for a stipulated time, or by satisfactorily passing an examination. Consequently

a candidate for the degree of barrister rejected by the examiners may, if duly qualified in respect of attendance at the public lectures, relying on this latter qualification, present himself, without dread of any rebuff, for enrolment amongst the fraternity of the Utter Bar. We say that this may be done under the circumstances put without fear of any rebuff, by no means forgetting that, subject to an appeal to the judges, it is wholly discretionary with the Bench of any Inn to call or to reject a student of their own house soliciting admission to the bar.

This state of things being obviously unsatisfactory, various suggestions have from time to time been made with a view to its amendment.

Many (and we confess ourselves to be amongst the number) are of opinion, that no test of fitness other than that offered by public examination can be recognised as altogether adequate for measuring the competency of a student wishing to apply himself to the discharge of forensic duties.

Others entertain a conviction that the certificate of a pleader, equity draftsman, or conveyancer, of regular attendance at his chambers during a period of one or two years, might properly be deemed equal in efficacy to that awarded by the Council of Legal Education to successful candidates.

Those who least favour a compulsory system of education, would insist merely on an enforced attendance at public lectures as likely to guarantee that respectable *modicum* of legal knowledge, which it is now usually supposed that clients have a right to look for in those who professionally advise them.

Amongst bodies, such as our Inns of Court, whose mutual relations are affected by conflicting interests, in a profession such as the bar, to which are attracted men differing from each other, fully as much in respect of mental culture as in respect of the mere accidents of fortune; it cannot be matter for astonishment that *bonâ fide* opinions should considerably vary with reference to the particular question now before us. Nor do we believe that any solution of it, productive of useful results, will ever be arrived at unless concessions be made, not oversparingly, to the matured convictions of some, and, perchance, to the prejudices of others.

Whilst willing, however, to concede and to conciliate, so that out of the projected meeting of the Delegates some substantial benefit may arise; we trust that the advocates of *thorough* legal education will keep one object steadfastly and unswervingly in view. Without, in any degree, underrating the advantages derivable from attendance at the public lectures—nay, holding as we assuredly do, that such lectures must constitute a necessary portion of any well-adjusted scheme of legal education—we are yet perfectly convinced, and could vouch authority for what we say, that the principles of Common Law, of Equity, of Real Property, of Constitutional Law, can only be effectually inculcated by patient and laborious exposition at the private readings—by explaining difficulties in an informal and conversational fashion—and by occasional examinations written, or *viva voce*, so carefully and judiciously conducted as to test the actual progress in legal knowledge made by the examined. We trust, then, that the committee of Delegates will keep in view the importance of stimulating the students to regular attendance at the private classes, and this we think might be effected by making such attendance, accompanied by due proficiency, when certified by the reader in each of two at least of the five departments, of equal efficacy with the passing of the ordeal of a public examination under the immediate surveillance of the council.

We should submit that the certificate of the reader thus given, of regular attendance at his private classes during a period of at least one year, and of proficiency tested by the private examinations which in a former part of this article we have recommended, would offer a sufficient guarantee that the student had in that particular department qualified himself for admission to the bar; and if such certificate were obtained in each of two departments, or if it be so thought fit in each of two of the strictly practical and one of the other departments, we apprehend that a fair if not a perfectly satisfactory test of proficiency would have been applied, meeting—so far as amidst the conflict of opinions can be met—the exigencies of the case.

Probably it may be deemed advisable to give the like efficacy to the certificate of a practising pleader, equity draftsman, or conveyancer, certifying to the regular attendance of its recipient

at Chambers during a defined period, and to the tutor's belief in the proficiency of his pupil.

- In either of the above cases, however, it strikes us as essential that the *form* of the certificate required should be precise and unvarying, otherwise laxness in granting it might become general, whence evil would infallibly result.

It would be vain to expect that any suggestions which we could offer, would exactly meet with the approval of those with whom the solution of the problem under our notice really rests, regard being had to the great diversity of views entertained in reference to it; we refrain, therefore, from entering into details touching it, which might be wearisome to the reader, at all events, until we have reason for believing that the outline of the amended scheme of legal education has been sketched and determined on. We are, however, not without hope, modified somewhat and dimmed by a retrospection of the past, that some approximation may ultimately be made towards carrying out the hints offered, with all sincerity, in the preceding pages.

No fundamental, radical, or sweeping change in the existing system of education, to adapt it for effecting much of the good originally anticipated by its promoters, is in our apprehension necessary. But the application of some strong stimulus, directly or indirectly, is most assuredly much needed to impel or attract our students to the pursuit of legal knowledge, which can alone qualify them for the bar.

ART. II.—*A Selection of Legal Maxims, Classified and Illustrated.* By HERBERT BROOM, M.A., of the Inner Temple, Barrister-at-Law, Reader in Common Law to the Inns of Court. London: Maxwell, 1858.

THE volume whose title stands at the head of these remarks, having been before the profession for fully a dozen years, and having just reached its third edition, would assuredly have been allowed to pass without comment in these pages, had not

opinions been expressed, by an ably conducted contemporary,¹ respecting the arrangement of its contents, differing exceedingly from those put forward by ourselves in this periodical, when the original issue of the work in question had but just appeared. We then characterized the principle of classification as important, and observed that² "The main distinction between Mr. Broom's work and those which have preceded it, and of which we have traced the history and character, is, that Mr. Broom classifies his maxims, and illustrates them by a reference to modern cases, and gives the exceptions and qualifications of the rules, as well as the rules themselves. In the first respect he is different from Bacon, who, as we have seen, idly rejects classification. In the last he is different from Noy, who does not limit and qualify. In the principle of illustration, he differs from Branch and Halkerston, who merely collect; and in the *character* of his illustrations from Bacon, Noy, and Wingate, who refer mainly to obsolete law, and in unnecessary abundance. The principle on which Mr. Broom has made his selection of maxims has been that of careful comparison of the Reports, Digests, and Treatises, for those which are most frequently cited in the courts, and bear on the most practical affairs."

The importance of associating together principles of law with cases illustrating those principles, and further of fixing principles in the mind by aid of maxims cited and recognised by the older writers, has, we believe, from the time of Lord Bacon to the present, been pretty generally admitted.

Nor merely for educational purposes, but in actual practice, must a book which assists towards the formation of such a habit of association, and towards strengthening the lawyer's memory and power of grasping principles, be appreciated and sought after. An election betwixt two methods, in dealing with his subject, was obviously open to its author: he might have endeavoured to *classify* as well as illustrate our legal maxims, or he might have exhibited them *alphabetically arranged* and duly annotated to his readers. In our former notice of Mr. Broom's volume, we ex-

¹ See The Solicitors' Journal, for Oct. 2, 1858, p. 957.

² See The Law Magazine for February, 1845, pp. 116, 117, 122.

The maxim, it will be remembered, has some direct and not unimportant applicability in actions sounding purely in contract, *ex. gr.*, a covenant or undertaking strictly personal "dies," according to legal phraseology, "with the person," and a claim arising out of contract, as for the breach of a promise to marry—such breach, exclusively affecting the person of the promisee, will terminate or expire with him. And Mr. Broom, in fact, introduces the student to a consideration of the maxim as to *actio personalis*, by a brief and condensed commentary, comprised within some five pages, concerning the effect of the death of a contractor upon the efficacy of his contract or agreement. The author subsequently, no doubt, proceeds by a natural transition to speak respecting action *ex delicto* and the provisions of Lord Campbell's Act.

By placing together, comparing, and, if we may so express ourselves, elucidating the affinities of maxims which, at first sight, and to the uninitiated, may seem to have no connection with each other, a knowledge of law, *as a science*, will most readily be acquired; and if, in carrying out the process indicated, some discrepancies are observable, they ought surely not to be remarked upon, in proof that the system of classifying is bad, but should rather be regarded as of necessity incidental to an attempt at scientific generalization.

It is not, however, solely in reference to the points above noticed that we unfortunately find ourselves at issue with this reviewer. He seems to us disposed greatly to undervalue the importance, to a lawyer, of familiarity with decided cases; for after noticing that in preparing the recent edition of Mr. Broom's book, decisions which have accumulated during ten years have been sifted and examined, he adds—"Fresh cases it may be observed, however, are of less importance to a compendium of legal principles, than to such law books as treat of practice. 'There is nothing new under the sun,' and *modern ingenuity seldom discovers a fresh principle of law*, or fails to apply successfully some one among those already sanctioned to new combinations of circumstances." Now, upon this latter proposition we have to observe, that albeit *in theory* our law is doubtless perfect and complete, yet *in fact* this is notoriously otherwise,

and new principles may have to be judicially declared should it chance that "new combinations of circumstances" call for their development. "Cases," said Lord Redesdale, as reported in 2 Scho. & Lef., 666, "cannot always be found to serve as direct authority for subsequent cases; but if a case arises of fraud, or presumption of fraud, to which even no principle already established can be applied, *a new principle must be established to meet the fraud,*" &c. How, we would further ask, can the true nature of legal *duties* be determined unless by reference to legal *principles*? And inasmuch as the number of the former will never be fully told, so neither will the catalogue of the latter ever be accomplished. It is too much the custom to designate as "principles" what are indeed but vague generalities, *ex. gr.*, "reason" and "justice." And some apparently fall into the error of supposing that books like that of Branch or Halkerston, or "The Grounds and Rudiments of Law," &c., or even my Lord Coke's elaborate Reports, contain within them the *entirety* of the principles of our English law. The fallacy here indicated will become obvious when we call to mind that, from the Roman law—from the Digest and Institutes of Justinian—principles and rules of jurisprudence are not seldom drawn, which, although devised centuries ago, sound in truth as *new* in our ears, having been allowed to slumber through the intervening ages unheeded, unrecognised, and unapplied.

In the edition of Mr. Broom's work now under our notice, which we may remark nearly doubles in size that originally issued, the following maxims, with ample commentary attached to each, have been inserted:—*Rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem. In præsentiâ majoris cessat potestas minoris. Audi alteram partem, and Nemo tenetur seipsum accusare.* It seems to us further, from such examination of its pages generally as we have been able to bestow, that in other portions of the volume considerable emendations have been made, and many interesting illustrations of legal principles, culled chiefly from the most recent reports, have been superadded to those which the second edition had contained.

This "Selection of Legal Maxims," which we understand has

been extensively circulated in India and Australia, as well as in Ireland and in this country, and of which some four or five editions have been printed in the United States, will, we doubt not, in its present form, be recognised as a valuable adjunct to every law library.

ART. III.—EXTRACT FROM AN ANCIENT READING
ON THE LAW OF SEWERS.

A MANUSCRIPT reading, delivered by John Herne of Lincoln's Inn, A.D. 1638, has specially attracted our attention, whilst perusing a recently published catalogue of the manuscripts in the public library of Cambridge. The subject discussed by the Reader is the Statute of Sewers, 23 Henry VIII, c. 5, and the general law thereon. The reading is, in date, some few years later than that by Callis on the same subject, which has always been regarded as an authority.

Callis, it may be remembered, was Reader at Gray's Inn, A.D. 1622; whereas John Herne read at Lincoln's Inn in 1638. He seems to have been a law writer of some repute, and amongst his works is to be found a treatise on the Law of Charitable Uses, wherein the statute 43 Eliz., c. 4, is set forth and explained—published about 1663—which, judging from the preface thereto, would seem to have been the first publication upon this subject. It passed through at least two editions. Herne also published a work in folio on pleading, and two treatises on conveyancing—in or about the year 1657.

An abstract of the Reading on the Law of Sewers, of which the introductory portion is given below, has appeared in print—two copies of it are to be found professedly translated from the French in the Inner Temple library, and it is noticeable that the translator of this abstract speaks of the author in his preface, as one known to most of the Royal Commissioners of Sewers for Westminster and the parts adjacent, and as distinguished for his learning. The translator adds, moreover, that he cannot find or

learn that any besides Callis had ever written upon this statute, "therefore it is the rarer."

The learned Reader on the statute thus commences:—

"The law of the 23 Hen. VIII., c. 5, and all the rest of the laws made, touching sewers, both by the several titles, preambles, and bodies of the laws themselves, do plainly show that the same were made in aid of the prerogative which concerns the preservation and benefit of the king's subjects, whence, in the first place, may safely be concluded (and so I do read) that this law ought to have a benign, large, and beneficial interpretation even against the general rule of law given by exposition of statutes—for, if we consider this law, it is not only penal, as in Platt's case (Plowd. Comm.), where it is said that every statute is penal to some one or other, by payment of some mulct of money, or by forfeiture of some other thing touching a man's estate; but it is a penal law in a higher degree, to the very body and person of a man, and to his inheritance and freehold, to lose the liberty of the one and the profit of the other; and all such statutes are to be taken strictly, and this is such an one; and yet I read this ought to be taken largely and expounded by equity for this only reason—'*Interest reipublicæ*.'

"To make this more clear, that this concerns that part of the royal prerogative, I must not only *sectari rivulos sed petere fontes*, not only seek after the state and growth, but even calculate the nativity and birth, and search out the very generation and original cause of this prerogative, and so consequently of this law made in aid of that prerogative; first, therefore, I say for my grounds that there was *jus gentium*, the law of nations, before there were kings, and that kings were first made by that law of nations—so saith Baldus—*ex jure gentium Reges originem ceperunt*. That kings were no sooner made by this law of nations, which is that of the common law of England, but presently the same law, *ut creatus fuerit Rex ei omnia regalia concedantur ut pisces Regales, volatilia regalia*—as whales, sturgeons, and wild swans upon the sea—and customs for merchandizes and wrecks of sea are perquisites royal, due to the king by his prerogative, and treasure found upon the land, and mines of gold and silver found in the lands of any subject, are perquisites royal. In like

manner, (Staufords, 37, 38 Bract, lib. 3, cap. 339, 335,) all the land in England is either mediately or immediately held of the king, and therefore in retribution as it were for those prerogatives appropriated to him. What prerogative is more kingly, more suitable to a crown and diadem, than for him who is both *regens* and *protegens subditos*, and is king and lord both of sea and land, and hath the best things from them, both to provide for the peace and safety of his people and subjects—who cannot in an island as this is subsist without safe traffic both by sea and land? Our authorities put this prerogative fully. That book saith that *le mer est de la graussté de Roy come de son corone d'Engleterre*. It is then said—*Le Roy fait que le peace soit aussi bien gardé in le mer come in la terre*. It is then resolved, that the statute of prerogative made 17 Ed. II., which provides *quod Rex habebit wreckum maris per totum regnum*, is but a declaration of the common law, and that the same was due to the king before that statute. Nor shall I pass by unremembered, that King Edgar, one of the Saxon kings, made a survey yearly of the four great seas, and styled himself and caused to be engraved upon his tomb, '*Dominus quatuor marium*.'

"The sea is not only under the dominion of the king, but it is also his proper inheritance, and for that reason the king shall have the lands gained out of the sea. And I conceive it were absurd and incongruous to allow to the king this prerogative as to the sea only, and not to the rivers, which participate of the nature of the sea, and are said to be as the branches and arms of the sea, for how is the whole body bound if the arms be at liberty? and the ports and havens between them both (which are *ostia et januæ regni*), they also appertain to the king, as *custos totius regni*.

"And for authority on this point. The commission of sewers, at the common law, which was awarded to the king by virtue of his prerogative before the making of this or any other statute of sewers, and did extend not only to walls and banks of the sea, but also to navigable rivers and fresh-waters, agrees with the former authorities, and there is recited the king's commission to his high admiral, whereby he grants *omnia bona waviata ac bona et catalla in mari deperdita, seu extra mare projecta*; and also,

omnia et singula casualia tam in vel super mare ut littora, crekas, et costeras maris quam in vel super aquas dulces, portus, flumina, rivos, aut alia loca superenunciata quæcumque.

“And to (establish) all I have warrant, even from the words of this law itself, where the king said that he, by reason of his dignity and prerogative royal, is bound to provide for the safety and preservation of his realms in this behalf. And as F. N. B., fo. 113, hath it, the king ought of right to save and defend his realm as well against the sea as against enemies, that it be not surrounded nor wasted, and to provide remedy for it; and also to provide that his subjects have their passages through the realm by bridge and way in safety.

“So as by this it appearing in general what the king might do in this case by his prerogative, before any statutes made, it will, in the next place, fall into consideration in what cases that prerogative is enlarged by this statute; concerning which I propose these observations, which arise by comparing the commission of sewers given by the statute, the one with the other.

“Now the real and material differences between these two commissions are these (because, not only the art of memory, but all other arts are best seen in the glass of method.) I shall endeavour to demonstrate them by these three ensuing rules:—1. *Per enumerationem delicti.* 2. *Per admeasurementem extenti.* 3. *Per gradationem pœnæ.*

“As to the first, the enumeration of offences and defences—within these commissions, that at the common law hath only these eight—

Walls	Bridges	} But the commission by this statute hath not only these eight, but many more besides as :—
Ditches	Causeways	
Gutters	Stankes	
Sewers	Trenches	
Banks	Milldams	} And lest anything should be omitted, it hath also these general words; “or other lets, impediments, or annoyances.”
Streams	Locks	
Mills	Hebbingweares	
Ponds	Hecks	
Fishgarths	Floodgates	

“As to the second, by admeasurement of the extent, the commission at the common law hath *his* extent; but to the maritime

places, as appeareth by those precedents in the Register and F.N.B., fo. 113, the one of them being to survey the defects in the places of Holland, in the county of Lincolnshire, the other for the surveying of the surrounded grounds between the rivers of Humber and Holland, in the said county. So as it seemeth by these commissions, that the damage done *per impetum maris ac refluxus per inundationes aquarum*, in and by rivers then navigable, was chiefly aimed at and sought to be reformed.

"But this statute was made to enlarge the extent, as appears by the very title of it; being entitled a general act containing the commission of sewers for all the realm of England. So as I do read that this statute extends not only to maritime places, but to the upland or island country, not only to rivers navigable, but to rivers not navigable, not only to rivers then *in esse*, but to rivers made, or to be made *de novo* since the making of the statute, and not only to rivers but to sewers, a diminutive of rivers, nay to gutters, a diminutive of sewers, nay to ditches, a diminutive of gutters, provided and with these cautions:—First, that all (and every) of these extend to one of these two ends; first, to the furthering¹ or impediment, either of navigation and sailing, or of the draining of marshes and overflowed grounds. And secondly, that such navigation and draining do continue the public's, and not of some one or a few private men alone; and I hold that these differences and cautions being observed, will make a plain and easy way throughout this whole statute for the clearer explanation and exposition thereof in dark places, with this one thing more added, that this law extends to make rivers navigable *de novo* in case of the public, for draining the country, but not to make rivers not navigable, whereupon private men have mill-streams or stankes, to become navigable, for that I conceive cannot be done without a special Act of Parliament.

"And I do read that, on the contrary, any brook or river which by art and industry cannot be made navigable, nor be any either furtherance or impediment either of navigation or of draining, and where such navigation or draining also does not concern the public but the private (interest) of some one or few (is) not within this law. And herein I hold it not improper to compare

¹ Hindering.

the highways upon the land to these rivers and ways leading to the sea. As the king is lord of the four seas, so hath he four principal highways through his lands, made first by Belinus son to Mohiennius, a Saxon king; still holding and known by their names at this day—1st, the Fosse-way; 2nd, Watling-street-way; 3rd, Erming-street-way; 4th, Pykemilde-street-way. And as the king hath *flumina regalia*, inferior but next in order to the seas, so he hath *vias regales*, although inferior yet next in order to these *flumina regalia*, so be these commission-ways inferior but next in order to those *vias regales*. And as there be brooks and small rivers which cannot by any art or industry be made navigable or of use, either for navigation or draining, and so not within this law; so are there private ways, both footways, horseways, and cartways, which rest in use and interest only between one private man and another, and neither concerning the king nor the common people,

“Now as to the three first sorts of these ways, in all which there is *proprietas domino, usus populo, potestas regi*, I hold the king may, by the common law, award a commission to set forth, limit, order and reform them, but not as to the last. So as to the sea and rivers navigable, or which may be made navigable or of use for draining, this statute and commission doth extend, but not unto those which by art or industry cannot be made navigable, nor be any furtherance or impediment to navigation or draining; for these concern merely the interest of some private person, and neither the king nor the public.

“As to the 3rd—*per gradationem pœnæ*, by the several degrees and increase of punishment.

“That all the common law gives power, but *ad distringendum* the parties, *per quantitatem terrarum sive pro numero acrarum sive per corneata pro ratâ portione terrenæ suæ*, to repair and amend those defects that shall be found and presented before the commissioners. But that by this statute gives power—(1st) to tax and assess; (2nd) to prostrate and overthrow mills, locks, weirs, and other impediments; (3rd) to depute officers for the reparations to be made, and collectors for the receiving and laying out of the money that shall be levied and paid; (4th) to punish the debtors and detainers by fines; (5th) to arrest the horses of

other men, and likewise labourers, to do the work ; (6th) to take timber and other necessities upon other men's grounds and inheritances ; (7th) to make laws and decrees, thereby to grant and decree away other men's inheritances and estates, beside many other particulars obvious to him that shall well peruse this statute ; and which hereafter I shall have occasion to discover. So as from the premises, I may well conclude the differences between the common law and this statute law to be the same as between a prince and a tyrant. The common law, which is a law of mercy, like a lawful and merciful prince, looks only after *capita rerum*, the great offences, and extends power and punishment for repressing gross and exorbitant enormities only ; but this statute, as a tyrant, goes down with all, without sparing the least offence or offender, not only to amend a seawall or a bridge, but also to pull down and overthrow mills and stankes, yea, and the least impediment and annoyance ; not only to distrain the parties, but 1st, to arrest ; 2nd, to fine ; 3rd, to imprison ; 4th, to decree from him his estate and inheritance ; and yet, herein appears the wisdom of the Parliament in setting up one tyrant against another, for what more tyrannous and more unmerciful than the sea and inundations of water ? which made the prophet David, when he complained of the cruelty and unmercifulness of his enemies that sought his life, to use this metaphor, 'That the rivers had gone over his head, and great waters had overwhelmed him ;' and, therefore, an element fit to be repressed and restrained to his own proper bounds and limits, by all the trials that the wit and industry of man can possibly invent. To which end this statute was made.

" Thus much I have briefly premised as the porch and entrance into that poor building which I have proposed to erect upon the law, which, being altogether rough and unpolished, you may certainly foresee and conclude will be chaos rude and unpolished. However, it being now a necessity upon me, relying upon your favours and assistance, I shall proceed on and adventure to set upon the body of this tyrant, and as it follows for me in order to do, break in pieces and divide this statute, limb-meals, into his several parts. I confess it is over-large, both in words and matter, to be all reduced into the exercises of four or five days ; but the

places being best divided into nouns and verbs, and they also being so numerous both together, I have made choice for avoiding all curiosity in seeking to anatomize him in each artery, vein, and muscle (the parts less principal), or by the several nouns, as mills, wears, stankes, and so of the rest named in this statute, to render him to your view and judgment as I find him to stand and depend upon these verbs (as the parts more principal) :—

(1.) Supervidendo,	}	in	Survey of the Commissioners.
(2.) Inquirendo,			Presentment of Jurors.
(3.) Taxando,			Rating of the places chargeable.
(4.) Assignando,			Substituting Collectors and Officers for the work.
(5.) Arrestando,			Arresting the bodies and goods of men to perform the work.
(6.) Ordinando,	}		Making laws and ordinances to uphold the work.
(7.) Determinando,			Deciding and determining the particulars by the law directed.

“ All these seven respect chiefly the medium, but there are other three respecting the end also :—

(1.) Defendendo,	}	And of all these three there is mention made in the case of the Isle of Ely, in Sir Edward Coke's report.
(2.) Amovendo,		
(3.) Destruendo,		

“ And, according to the law of drains, we shall also see in what cases these verbs will govern the several nouns mentioned in this law. And thus having marshalled and set in order this great commander, with all his troops advancing and marching forward with fulness of power, both of jurisdiction and coercion, not only to assuage the said swelling of the rivers and fresh-waters, but even to withstand Neptune himself, if he shall but once offer beyond his shore to set upon the lands, I find that this lawful prince, the common law, as his superintendant and controller, and being provident that this tyrant make not usurpation upon his dominion, hath mustered up a whole army of *quæres* to encount him by the way, and to call into dispute or question the right and legality of such his authority claimed by him. But at length a *parlor* being admitted, this accord is concluded, that you, my masters of the bench, and fellows of the bar, shall, with myself for this time, reconcile and determine the differences between them, some of

which, as the heads under which all the rest may be comprehended, I shall now relate unto you :—

“In the first branch, which consists in *supervidendo*, stand up these two *quæres* with their attendants.

“1st. Who is a good commissioner to make a survey in this law?

“2nd. Whether a survey alone without an inquiry shall be good within this law? Against the second branch, which consists in *inquirendo*, stand by these *quæres* with their attendants. 1st. For what things a tax shall be made within this law? 2nd. What persons and after what manner they are to be taxed by this law? in which point Rook’s case in Sir Edward Coke’s 5 Rep. hath given some, and the case of the Isle of Ely, in the 10th Rep., farther direction. Against the fourth branch, which consists in *assignando*, stands up this *quære* with his attendants. 1st. What shall be said a due execution of the several offices, and what not within this law? Against the fifth branch, which consists in *arres-tando*, do stand up these two *quæres* with their attendants. 1st. Who are persons capable to make such arrests? 2nd, In what cases such arrests are lawful, and in what not within this law? Against the sixth branch, which consists in *Ordinando*, stand up these *quæres* with their attendants. 1st. What things they may ordain *de novo* and what not? 2nd. What ordinances shall be binding within this law, and what not? Against the seventh branch, which consists in *determinando*, stand up these *quæres* with their attendants. 1st. After what laws or rules they shall determine within this law? 2nd. After what form they shall determine within this law, wherein the books and cases formerly cited in the 5th and 10th Reports do give some light? Against the three last branches, which consist in *defendendo*, *amovendo*, and *destruendo*, do stand almost infinite *quæres*, the whole country rising as it were by troops in arms, muttering forth these questions :—One demanding why he should be charged with 100s. to defend a sea wall, when his whole estate inheritance in those places is under that value?

Another why his milldams,
Another why his ponds,
Another why his floodgates,
Another why his locks,
Another why his trenches,
Another why his wears,

} being the ancient inheritance of
them and their forefathers, should
be pulled down and overthrown?

Another why his person should be arrested and imprisoned? Another why his goods should be taken? Another why his timber-trees and woods should be felled off his ground? Another why his inheritance and estate should be taken away before his eyes, and against his will, and transferred to a stranger?

All these severally, and many of them together, do pray in aid of their lawful prince, the common law, against this tyrant, this statute, to have redress and relief. And therein do for this time submit themselves to our opinions and judgments. Thus in a short time, and in a few words, I have raised up I fear more spirits than I shall, without your favour and wisdom assisting me, be able to conjure down again in many days. I shall now therefore begin to take in hand those queries which depend upon the first, second, and third branches, viz:—the survey, the inquiry, and the tax; but yet so that something may intervene which concerns some of the rest, and in handling some of the rest, something intervene concerning these; for necessity enforceth me, in these cases to be argued, not to take the parts in order according to my division formerly made, but promiscuously: I should not else go through all the parts, or otherwise make my cases perplexed, and so long and tedious, that it would not become (your) reader to present them for your arguments and resolutions. And therefore I have chosen to err rather in form than in matter, and rather to deal with the whole law though not in a direct series, than to deal with some parts only, and leave you in doubt and suspense concerning the residue, which happily are and may be of the best use to be understood. First, as touching who may be a commissioner or justice of sewers within this law. I do read that the king is the principal and supreme justice of sewers within the realm. For to be a king is not only a title of dignity, but a title of office. *Imperare non est regnum sed officium*, Herodotus, lib. 1^{mo}, and the duty of that kingly office is to do justice *ad omnes in omnibus*. But to a title of dignity only without an office, as to be a duke, an earl, viscount or a baron, none of these, by those titles only, can extend or be justices of sewers, of the peace, or otherwise.

“And yet I do read that although the king be the supreme justice, yet is he not justice within this law, for all fines for

offences within this law are to accrue to the king, and so he should be judge in his own case, which even the law of nations will not permit.

"There be also divers qualifications within this law itself who are capable, and who not, to be commissioners and justices within this law, which I shall need to particularize. But who, besides those, are by the rules of the common law, in respect either of natural or other disabilities, incapable of this employment, is worthy the question. And although the statute does not design what manner of persons shall be commissioners within this law, yet it doth design what manner of persons shall be inquirers within this law, viz, honest and lawful men upon their oaths: first, he must be *probus homo*, and therefore a person convict in a writ of conspiracy or an attaint ought not to be an inquirer.

"And I read that he may be an inquirer, which cannot be a commissioner, as he that becomes blind cannot be a commissioner, for he cannot then survey as this law appoints. And the survey required by this law is by the eye of the commissioner himself: he must be *oculatus testis*, and that in an especial manner *non procul*, as a livery which in view may be made, *sed prope*, to discern every particular inspected. Neither can he make this survey by another: he cannot do it by his attorney, but it may be done in his own person, yet such an one may be an inquirer, for that he may perform it *sine visu et ex auditu proprio*, from and by the testimony and evidence of others. But whether a woman may be a competent justice or commissioner within this law is not merely a conceit, but considerable both in human and divine learning. This law doth design the jurors to be of honest and lawful men, but it designs the commissioners to be of such persons (without the distinguishing the sex) as the Lord Chancellor, the Lord Treasurer, and two Chief Justices shall name, so as it differs from the words of the statutes which create justices of the peace, for those do assign good and worthy men (not women), which be no maintainers of evil, nor barrators in the country, to be justices of the peace. So as without all question a woman is incapable to be a justice of the peace. But this law of sewers is general, such persons not distinguishing the sex, and therefore the women not excluded; and although St. Paul

would have women keep silence in the churches—and although, in Trindon's case in the Comment., fo. 497, women are not to administer the sacrament or say divine service—and although in the second chapter of Timothy the woman is not suffered to rule over the man, and yet *non sequitur* that because she shall not have *curam animarum* or *dominium viri*, that therefore she should be incapable of temporal government. For in the first commission that gave man his greatest power and command Eve is joined in common with Adam: 'Be fruitful to replenish the earth and subdue it, and have dominion over the fish in the sea, and over the fowls of the air, and over every living thing that moveth upon the earth.' Deborah we know was judge of Israel. Semiramis governed Syria. The Queen of the South for aught appears was an absolute queen. Nor need we seek into foreign realms for proof of this. Was not the government of the late famous Queen Elizabeth here most renowned? Did not Richard I. and Henry V. depute by commission their mothers to be regents of this realm in their absence in France? And in 12 Eliz. Dyer it is resolved for law that, when Humphrey of Bohun, judge in martial affairs, died without issue male, whereby the office descended to his two daughters and coheirs, that albeit this was an office of justice, that yet they might execute the same by deputy, for being women they were unfit martially to judge of things of that nature. But who knows not but that a deputy can do nothing but in the name of his master and mistress, and in their names was the martial court to be kept? So in case of this statute, I hold women as unfit to deal in sewers and water works, as in martial, and so secluded as unfit, and yet I hold that in law they are not excluded as incapable.

"But this by the way; I shall now proceed to declare who are to be taxed, and for what, within this law, and these be of three sorts. First—He through whose fault the damage hath happened. Secondly—He who hath or holdeth any lands or tenements or common of pasture, or profit of fishing, or other commodities in or near to the place. Thirdly—He who may have or hath any hurt, loss, or disadvantage by the impediment or annoyances.—To put all these three together:—

“ 1. What is a good survey ?

“ 2. What is a good inquiry ?

“ 3. What is a good tax within this law ? I put this case :— A, seized of an acre of meadow in T, holden of B by 5d. rent, and to repair the wall between the meadow and the sea ; and C, parson of the rectory of T, seized of a mill that cannot grind but upon an inundation, by reason of the defect of the sea-wall, and of the tithe corn, of sale of which mill and tithe corn the rectory only consists, the wall is broken down *per impetum maris*. B distrains for the service, A brings a replevin, B avows, and A disclaiming, six of the commissioners, whereof three are of the quorum, and none of them above twenty years old, make a survey upon Saturday, an inquiry at a court holden upon Sunday (before) ? the twelve Jurors, of which six are outlawed. The commissioners prostrate the mill, and tax A, B, C, and all others having lands within the *level*, to repair the breach.

“ Here is—

A good Survey,	}	within this law.
A good Inquiry,		
A good Prostration of the mill,		

“ Here is a good tax upon A and all the *levellers*, but no good tax upon B and C within this law.

“ I read, if A cast a bank or make a wall for the safety of his own private grounds from the inundation of the fresh-waters, and afterwards suffer the same to decay, he cannot be taxed to make the same up again by this law, for the banks and walls within this law are such only as belong to the public rivers and streams ; such as have common of pasture, turbary, or pasture in fences or marshes, are to be taxed within this law ; so he which hath a ferry over a river ; so he which hath *primam vesturam*, or *tonsuram*, or the herbage of the land. But I hold a market or fair, although it be to be kept within the level, the same is not to be taxed within this law, being no part of the soil or of the profit thereof, as I conceive. If A keep a boat for his own necessary occasions, there can be no tax to relieve him with waters, for such his own private use within this law, for the power extends to tax in cases for the republic. (?) But if A hath used with his boat to carry and recarry for the convenience of the

people in general, then may a tax be made to relieve him with waters within this law.

"If J. S. make a stanke on the new river from Ware to London, whereby the water is diverted, he may for this be fined, or amerced by the commissioners of sewers, but not within this law, for that the use of that water or river is neither for public navigation, nor for draining; but by a special law for that purpose made *anno tertio Jac.* that new river is made subject to the commission of sewers. And sithence, in the case to be argued, these three things, the survey, the inquiry, and the tax are three of the divisions and parts which I have made in this law. Now as I have already given a fourth (and shall perform it more at large hereafter), upon whom, and for what, and after what manner a tax is to be made within this law; shall I now shortly declare what is the survey—what is the inquiry meant and intended by this law; and then afterwards I shall diligently hearken and attend for my further knowledge, and information to your arguments, reasons, and resolutions of my case."

ART. IV.—*The Judges of England, with Sketches of their Lives, and Miscellaneous Notices connected with the Courts at Westminster, from the Time of the Conquest.* By EDWARD FOSS, F.S.A., of the Inner Temple. 6 Vols. 8vo. London: 1857.

TO have successfully supplied a chasm in the legal literature of England is no unenviable success. To have executed the task with such a depth and variety of research, with such vigilance, acuteness, judgment, and skill, as to set all future competition at defiance, and produce at once a work perfect in its kind, is assuredly high praise. This high praise, however, and nothing less than this, is fairly due to Mr. Foss. Hitherto Dugdale's *Origines Judiciales* and *Chronica Series* has been the only guide for the inquirer into the personal history of the Bench. But every one who has had occasion to consult that work must be aware of its manifold imperfections; its faults of commission and omission; its inaccuracies, misstatements, blunders, and general

untrustworthiness. In the work before us, an almost perfect accuracy and fulness has been achieved by an almost unequalled labour of research. The Year-books and subsequent Reports, the State Trials, the Patent Rolls, the Close Rolls, the Baga de Secretis, the Pells Records, the stores of the State-Paper Office, the Lansdowne MSS., the Harleian MSS., and other MSS. in the British Museum, MSS. in the College of Arms, the Egerton MSS., the Petre Papers, the Paston and other family Papers, the Black Book of Lincoln's Inn, County Histories, Local Histories, Wood's Fasti, the Gentleman's Magazine, the Camden, the Chetham, and other Societies' publications, are some of the sources from which Mr. Foss collects his information. Accordingly the result is a mass of learning which, besides exhibiting multiplied points of interest to genealogists, antiquarians, and historians, not seldom throws light on questions of law, and especially questions of constitutional law. But it is principally as a companion to the Year-books and earlier reports, and abridgments and treatises, that the book will be found useful for the studies, and in the practice, of the bar. Those who design following the well-known maxim—*decantatum illud*—to seek the law at the fountain head; that is, to examine the original springs of it in the first class of the works just indicated—find themselves perpetually baffled by the difficulty of ascertaining from a Year-book report, which part of what is said is due to the bench, and which to the bar; when it is a judge that we listen to delivering the law, and when a counsel arguing for his client. This difficulty necessarily leads to mistakes: from very early times, even in the hands of masters, it has led to mistakes. In Broke's Abridgment, in the 500 cases reported by Coke, in Coke's Commentaries on Littleton, many an instance may be shown of matter laid down for law, with a reference to a Year-book as authority for it, on narrowly examining which, with the help of Mr. Foss's work, it turns out that the statement is that of the counsel and not of one of the judges. No doubt, there is hardly a volume of the more modern reports in which may not be found observations upon erroneous statements originating in this way, made either at the bar or by the bench, long previous to the publication of Mr. Foss's book; but it is one part of the great value of that book, that from its

high accuracy, and the excellence of its arrangement, it affords the easiest possible means of detecting in a moment this description of misstatement. It is, however, with a far higher merit of this work that we are principally at present concerned—a merit which we believe to be of unspeakable importance. Every one who has watched the course of biographical and historical literature for some years past, must necessarily, we think, have observed a certain tendency to depreciate and vilify the characters of the judges of times past, and principally, though not exclusively, of the judges who lived under the Stuart kings. On this head, in the writings to which we refer, it is not uncommon to find showers of vituperative eloquence poured out, a large expenditure of indignation, a cheap and easy display of virtue, the whole resting as its only basis, for the most part, either on anonymous slander and popular rumours, put into print originally by the idle energy of some gossip-monger, or at the best, on statements of truths highly exaggerated and much distorted. If these attacks were properly limited (as they never are) by name and otherwise to the very small number of judges—fewer than half a dozen men—defective in integrity, out of the thousands who have occupied the Bench since the authentic judicial series begins, the evil would be vastly less, or rather, perhaps, no great harm would be done. But the fact is not this. Or if these writers, while they fervently denounced, and held up to scorn real, unquestionable, proved judicial delinquency, took the trouble at the same time to point out, and duly to extol, the really great deeds of the judges of past times, how they had ever and anon stood between the crown and the people, establishing in very early times, and never deviating in later times from, their maxims, *in favorem vitæ*, in restraint of taxation, counter to restraint of trade; and in a thousand other ways earning the applause and devoted attachment of the nation, which in no way did they seek or bid for; the evil would be vastly less, or rather, perhaps, no great harm would be done. But again the fact is not this. The obverse of the medal is never turned; with the poison no antidote is supplied. No generous eulogy of merit accompanies the furious invective against delinquency. Surely learning and energy would be better employed in bringing together some of the innumerable facts which demonstrate, how

immense are the claims of the early judges to national gratitude, than in recording over again, and giving infinite circulation to, all the gossiping stories in disparagement of this judge or that, which it is so easy to collect, and to present in an amusing, and for some minds a fascinating, form. For instance, what possible advantage can any writer propose for himself or his readers, in gravely restating some silly rumour—silly because it can neither be proved nor disproved—which it seems somebody at some time or other set afloat, to the effect that Chief-Justice Popham, in his youth, took purses on the highway? Will the thousands of the present or future generations to whom this story is now made familiar, rise from it with increased tendencies to venerate the administrators of the law?

The passion for disparagement is not dead in the human breast; multitudes unfortunately derive an exquisite delight from the contemplation of unworthiness, in those who are set over them, in situations to which they find it humiliating to pay veneration and respect. Why then pander to such tastes, the basest that belong to man? Mr. Foss, we are glad to find, does not lend himself to this or similar injudiciousness. The fact is, that a judge, when attacked, is about the most helpless of mankind. He has no means of repelling an assailant; practically, the courts for him alone are not open. He cannot descend into the arena of polemical literature, to fight the sorry fight of pamphlets and newspaper articles. His only trust must be, if his life is spared, to live down his accusers; his lot is, to

“Trust on, and think to-morrow will repay.”

But there is no assurance of this. Lord Mansfield is an instance. Lord Mansfield's character never in his lifetime recovered from the malignant charges of Junius, nor did the poison of that serpent's tooth infect the populace merely; it reappears in fifty shapes, in speeches, in pamphlets, in letters in the newspapers, of that period. It was not without its operation even on the highest classes of society; as, for instance, on Horace Walpole and his circle. Now, let it be considered how many a liberally educated youth of the generations that have come into life since Lord Mansfield's time, has received his first impressions—those

first impressions which are so apt to prove the last—of Lord Mansfield's judicial character, from the highly polished and attractive language of Junius, and we begin to acquire some notion of the incalculable mischief which slander of this sort may effect. The slanderer has always the certain hope derived from the trite and vulgar but most true dictum, "throw dirt enough, and some is sure to stick." This is the source of his strength, the stimulant to his odious energies, the restorative of his flagging powers. Accordingly, there are multitudes of minds, it may safely be affirmed, as well in Great Britain and Ireland, and the British Colonies, as in the United States of North America, to whom the name of Mansfield is unalterably associated with sentiments of distrust, repulsion, hatred. Swallowing, in early life, confident assertion and vehement inventive, sugared over with fine language, as though it were the wholesome food of demonstration, many a man has never had power to discharge, from his system, the virus of those wicked invectives. The source may be forgotten, whilst the vague dislike is retained. It is an old story, and was true, as a description of the results of detraction, ages before Martial put the idea into words,

"Non amo te Sabidi, nec possum dicere quare,
Hoc solum possum dicere, non amo te."

But suppose it is desired to confute Junius, and prove to the satisfaction of every one whose mind is capable of seizing and retaining the charges at all, their falsehood and futility. Is that an easy, everyday, offhand kind of problem? Let us take one of these charges, which, reiterated by Junius in various forms, is in substance that Lord Mansfield had made it the labour and study of his life to introduce into the proceedings and practice of the court over which he presided, new principles derived from the arbitrary Roman Civil Law. Then, to investigate this imputation, which is made in five minutes, what do we require? The knowledge and accomplishments of a ripe and finished English lawyer, not to be acquired in much less than half a lifetime; together with the leisure, zeal, and perseverance necessary for the examination of the reported decisions of the court in Lord Mansfield's time; that is, to peruse, consider, and weigh all the cases in Burrow,

Cowper, and Douglas ; together with that competent degree of acquaintance with the Roman law, which is manifestly requisite to enable one to decide how far, or if at all, Lord Mansfield had a bias in favour of that system of jurisprudence. But supposing these, which perhaps will not be thought slight, difficulties to be overpassed, the better half of the task remains behind. For when we have demonstrated, as the result of our examination, ever so clearly to our own satisfaction, the senseless folly of the charge, nothing has been done until we have reduced the demonstration into a shape so much divested of technicalities, as to be appreciable by every unlettered mind that can seize and comprehend the gist of the original detraction. The truth is, this is all but impossible. Speaking generally, it may be said that 20,000 persons will be found to understand the slander, for one who could be made to comprehend the refutation. Now, the writers to whom we have referred are accustomed to make their attacks upon judicial integrity in terms far more general and sweeping than those in which Junius pushed his assaults upon a single judge, and the mischief is proportionably wider, because reiterated, laboured, pointed with many arts of rhetoric, as these later attacks are, they lead obviously to create an impression that the judges of the past, at least, were persons generally of characters not to be depended upon, much less to be admired and revered. It is as a contribution towards the establishment of sounder and truer views of these matters, that we are disposed to look upon Mr. Foss's work as pre-eminently valuable, because it furnishes some means, though not all the necessary means, of checking, testing, and overthrowing such statements.

We propose to devote some space to an examination of some of the more prominent cases of this species of defamation, which mows down, at one sweep, the judicial characters of whole generations, making no exceptions, but involving all in one ruin. Now nothing, in treating of such a subject, can be more grievous than to be obliged to mention, in connection with it, a name so illustrious and so reverend as that of Hallam ; yet it is unquestionable that many instances may be found in the Constitutional History, where attacks of this sort have been made far too unadvisedly. To take one such instance. Speaking of what he justly designates

"as perhaps the worst and most tyrannical act of James I., the prosecution of one Peacham, a minister in Somersetshire, for high treason," he proceeds:—"A sermon had been found in this man's study—it does not appear what led to the search—never preached, nor, if Judge Coke is right, intended to be preached, containing such sharp censures upon the king, and invectives against the government, as, had they been published, would have amounted to a seditious libel. But common sense revolted at construing it into treason under the statute of Edward III., as a compassing of the king's death. James, however, took it up with indecent eagerness. Peacham was put to the rack, and examined upon various interrogatories, as it is expressed by Secretary Winwood, 'before torture, in torture, between torture, and after torture.' Nothing could be drawn from him as to any accomplices, nor any explanation of his design in writing the sermon, which was probably but an intemperate effusion, so common among the Puritan clergy. It was necessary, therefore, to rely on this as the overt act of treason. Aware of the difficulties that attended this course, the king directed Bacon previously to confer with the judges of the King's Bench one by one, in order to secure their determination for the Crown. Coke objected that 'such particular,' and, as he called it, 'auricular taking of opinions was not according to the custom of the realm.' The other three judges, having been tampered with, agreed to answer such questions concerning the case as the king might direct to be put to them: yielding to the sophism that every judge was bound by his oath to give counsel to his majesty. The Chief Justice continued to maintain his objection to this separate closeting of judges: yet, finding himself abandoned by his colleagues, consented to give answers in writing, which seem to have been merely evasive."

In a note there is added: "In a former age the judges had refused to give an extrajudicial answer to the king.—*Lingard*, v. 282, from the Year-book Pasch., 1 Hen. VII., pl. 15." Then a few pages later we are told that, under the Stuarts, "the general behaviour of the Bench had covered it with infamy."

Now, the misconceptions and misrepresentations contained in this passage are grievous. Here the general reader is left to infer the

practice of the Crown consulting the judges to be unconstitutional and pernicious; and Sir Edward Coke is made to appear as protesting against it, until he was abandoned by his fellows. Now what Coke did object to was, not the king's asking the opinion of the judges—that was not contrary to the custom of the realm, as will be shewn presently; but to the mode in which, in this case, by a trick of Bacon's, the opinion had been asked; namely by a separate application to each judge at his own house, so that the result would have been, that the king would have had the aggregate of the several opinions instead of their aggregate opinion. What Coke insisted on and obtained was, that they should meet together, and after conference, and discussion, and deliberation, should give the result in a joint opinion, according to the usual mode adopted in such cases from the earliest times. To suppose that there is Coke's authority for saying that an extrajudicial opinion is unconstitutional if given by the judges, upon the reference of a question to them by the Crown, is perfectly idle; because Coke states in the Commentaries, the direct contrary to be law, thus:—"The King of England is armed with divers councils the fourth council of the king are his judges of the law for law matters, and this appeareth frequently in our books." And again he repeats the doctrine, that for matters of law the judges are *concilium regis*.¹ That he meant to state the consultation of the judges by the Crown to be unusual, is also an impossibility; for he had himself, as appears from various memoranda, published in his own reports, attended meetings of the judges as a judge, and been a party to the answers returned to the king. As for the statement that the judges, in former times, had refused to give extrajudicial answers, &c., it is simply untrue, Dr. Lingard being altogether mistaken in his account of the passage in the year-book referred to.

The following table contains an abstract of the number of occasions in each reign, which have fallen under our notice, of these consultations of the judges by the Crown, in each of which extrajudicial opinions were returned.

¹ See Co. Litt., 110 a. 304a. See also 3 Inst., 72. Fortesc. Rep., 392. 3 Inst. 143. 30 How. Sta. Tri., 773. 1 Bla. Com., 229.

EMER.	Extrajudicial opinions given by the judges.
Edward III.	One.
Richard II.	One.
Richard III.	Three.
Henry VII.	Five.
Henry VIII.	Two.
Mary	Eight.
Elizabeth	Twenty.
James I.	Twenty-three
Charles I.	Fifteen.
Charles II.	Five.
James II.	Two.
William III.	Two.
Anne	One.
George I.	Three.
George III.	One.

As to the other judges of the King's Bench having been tampered with, in Peacham's case, as stated in the above extract, we must confess we do not precisely understand the meaning it is intended to convey; what is obvious enough is, that the term is used in some invidious sense, implying that undue pressure, or bribes, or promises, were used to bring over those learned persons to an opinion which should be agreeable to the Crown, and that those means, whatever they were, proved successful. Now, of this there is no proof whatever. The transaction, however, has attracted much attention, and a great deal has been written upon it, and of late an objection has been stated to it, which occurred to no one, as far as appears, at the time; nor has such objection ever had weight to prevent applications for advice being made, by the Crown, to the judges on critical occasions, at any subsequent period of our history. That objection is this in brief. Assuming that Peacham was about to be tried by the identical judges consulted, the impropriety of judges conferring with the Crown about a capital case which they were afterwards to try, has been dwelt upon, and Coke has been supposed (erroneously altogether) to have rested his objection to giving his opinion on that ground, and has been applauded accordingly, at the expense of the other judges, his fellows in the court of King's Bench.

Now, the scruples of these persons, very nice in one direction, seem to leave them altogether in other respects. They see much

impropriety in the judges representing to the Crown what is the law with respect to a case which they may be called upon to try ; but is there no regard to be paid to the obligation of an oath ? Since the year 1344 the Common Law judges have been bound by oath, each on his appointment, "lawfully to counsel the king in his business." The tabular statement above given we know not to be complete ; but as far as it goes we know it to be correct. It indicates a pretty frequent observance of the obligation of that oath on the part of the learned judges, most of whom, it may be suspected, would have been at a loss to know what was meant by applying the term to it that Mr. Hallam applies. But, however that may be, certain it is that, on very many occasions, the Crown has ordered the judges to assemble and give their opinions on capital cases which were about to come before them, and such opinions have been given in the best times of the Bench—that is, when it has been filled by men of the highest learning and the brightest fame. Thus, in 1660, Hale and the rest of the judges were assembled, consulted, and gave opinions, previous to the trials of the regicides ; the same was done previous to the trials of the rebels in 1716 ; and so in Francia's case, and many other capital cases. And the ancient usage—in this respect departed from by Bacon in Peacham's case—was, that the judges being assembled, application was made to them for their opinions by the attorney-general or solicitor-general. This is expressly stated by Lord Coke "as the ancient use hath been to our predecessors,"¹ on one of the numerous occasions in which he attended, as Chief Justice, a meeting of the judges summoned for the purpose of advising the Crown ; so that it turns out clearly that the irregularity in Peacham's case was in the mode of making application to the judges, in the want of a previous summons, and in the separate consultation of each judge apart from the rest.

Our readers are now in a position duly to appreciate the value of the following observations, which we deeply grieve to find in any work proceeding from the pen of Lord Macaulay. The passage is from the Essay on Lord Bacon, and its tone is adopted, in too many places, in the noble lord's History of England. Speaking, in that essay, of Peacham's case, he says :—"Coke declared that

¹ 12 Rep., 131.

"it was a new and highly improper practice in the judges to confer
"with a law-officer of the Crown about capital cases which they
"were afterwards to try; and for some time he resolutely kept
"aloof.

"Is it true that in the time of James the First it was the established practice for the law-officers of the Crown to hold private consultations with the judges touching capital cases, which those judges were afterwards to try? Certainly not. In the very page in which Mr. Montague asserts that 'the influencing a judge out of court seems at that period scarcely to have been considered improper,' he gives the very words of Sir Edward Coke upon the subject—'I will not thus declare what may be my judgment by these auricular confessions of *new* and pernicious tendency, and *not according to the customs of the realm.*' Is it possible to imagine that Coke, who had himself been attorney-general during thirteen years, who had conducted a far greater number of important state prosecutions than any other lawyer named in English history, and who had passed with scarcely any interval from the attorney-generalship to the first seat in the first criminal court in the realm, could have been startled at an invitation to confer with the crown-lawyers, and could have pronounced the practice new if it had really been an established usage? We well know that, where property only was at stake, it was then a common, though a most culpable practice, in the judges to listen to private solicitation. But the practice of tampering with judges in order to procure capital convictions we believe to have been new; first, because Coke, who understood those matters better than any man of his time, asserted it to be new; and secondly, because neither Bacon nor Mr. Montague has shown a single precedent.

"How, then, stands the case? Even thus: Bacon was not conforming to an usage then generally admitted to be proper; he was not even the last lingering adherent of an old abuse. It would have been sufficiently disgraceful to such a man to be in this last situation. Yet this last situation would have been honourable compared with that in which he stood. He was guilty of attempting to introduce into the courts of law an odious abuse, for which no precedent could be found. Intellectually, he was better fitted than any man that England has ever produced for

"the work of improving her institutions. But unhappily we see
"that he did not scruple to exert his great powers for the purpose
"of introducing into those institutions new corruptions of the
"foulest kind."

Now, the objection to this mode of treating this momentous subject—and surely there cannot well be imagined any subject more momentous than the conduct of a judge on a question of life and death—is this, that it substitutes rhetoric and inference for knowledge—knowledge of the facts, and of the law and practice, as regards the case commented on. Lord Macaulay does not here, it is true, as is lamentably too often the case in other parts of his works, apply the terms "base," "servile," "time-serving," "hard-hearted," "ferocious," &c., to the judges; but the general effect of the passage upon the minds of ordinary readers, we cannot help thinking, would be an impression, that the judges in question were persons who were capable of "solicitation," of being "tampered with," of being open to "new corruptions of the foulest kind," in short (to express the thing in plain words), of selling the life of a fellow-creature. But a calm eye, and some reasonable inquiry into the circumstances, is all that is necessary, we are convinced, to lead a lawyer to the conclusion of the complete innocence of the judges. The king's part in the transaction might be disgraceful; but it is material not to mix up the judges in the indignation which the king's conduct arises in our minds. The judges could not help being applied to. If they were "solicited," it does not follow that they yielded to the solicitations, whatever those might be. There is no proof that they were "tampered with," if by that term be meant that means were found to induce them to give answers favourable to the king's wishes in the case, contrary to their settled opinions, and to their consciences. No corruption, in any sense disgraceful to the judges, appears in any statement of the transaction that is known to the public. The general public, as has been before observed, must ever be unfitted to view a case of this kind with a calm survey, much less to inquire into the law and practice relating to and governing it; consequently, the mischief as to them of misrepresentations, when once done, is perhaps for ever wholly irreparable.

We have noticed above a misrepresentation of Mr. Hallam, made on the authority of Dr. Lingard, to the effect that the judges, *temp.* Henry VII., had refused to give an opinion extra-judicially when required by the Crown to do so; and we shall now devote a few sentences to the examination of this matter, which is the more necessary, because this is the single instance in history in which there is any kind of pretence for saying that the judges have ever refused to aid the executive with their advice; for it is very remarkable that, while numerous instances—clear, unquestionable instances—are on record, where the judges have refused to give opinions to the House of Lords, to whom they are, by the constitution, assistants, having writs of summons each new Parliament, and being always considered in attendance during the sittings of the House:¹ yet they have never, in any recorded instance, departed from their oaths, nor refused to act as the *concilium regis*.² The case in question is only known from two memoranda in the Year-book of the first year of Henry VII., containing accounts of what took place, drawn up apparently by different hands; and, without omitting any material part, may, we believe, be briefly stated thus:—Humphrey Stafford having been engaged in treasonable practices, had taken sanctuary in the church of Culinham, or Colnham, which had the right of sanctuary in virtue of charters granted to the abbots of Abingdon before the conquest. The judges were assembled by order of the king; and when they were met, Hody, the attorney-general, in what we have seen, according to Lord Coke's authority, was the regular mode, attended upon them to learn their opinion on the question proposed to them, whether this right of sanctuary availed to shelter treason? Hussey, the Chief-Justice of the Common Pleas, is thereupon stated to have

¹ As late as 1755, they always were actually present. 3 Harris's *Life of Lord Hardwicke*, p. 58.

² The following are some of the records, &c., in which may be found instances of refusals of the judges to give opinions to the House of Lords when required:—*Rotul. Parliam.*, 39 Hen. VI., n. 12, p. 376; 31 & 32 Hen. VI., n. 26; *Lords' Journals*, 23rd May, 1614, 1st May, 1626; *Rotul. Parliam.*, 27 Hen. VI., n. 17 & 18; *Wilnot's Notes*, 102, 77; 4 Inst. 31 *Fortesc. R.*, 384.

represented the difficulty there was in rendering an opinion where the matter depended on a view of the evidences, and when the accused was to be brought before them thereafter. Hody explains that, if their opinion should be that the right of sanctuary extended to treason, Stafford would not be brought before them.¹ Now this cannot be tortured into an instance in which the judges refused to give an extrajudicial opinion, in a capital case, about to come before them, or some or one of them, for trial.

The party having fled to sanctuary had confessed his guilt; no *verdict* was necessary. What the Chief-Justice says amounts merely to this, "How can we give an opinion that can be of any value in a case where no opinion can be formed without a view of the charters, &c., on which this claim of sanctuary rests, especially as hereafter, if the accused is taken out of the sanctuary, and brought up for judgment, he may shew us, by means of the evidences, that this sanctuary extends to protect traitors?" In the end the course taken was, that the prisoner was brought up, had counsel assigned him, and pleaded the sanctuary, &c. Then a day was appointed for the abbot to produce his charters, &c., which was done; and all the judges and the king's serjeants went into an elaborate examination and discussion of the terms of these instruments, which they found to extend only to protect inhabitants, not fugitives, as it was noticed the rights of sanctuary in the charter of the Abbot of Westminster expressly did. It appeared, also, that the right applied only to such offences as the abbot could punish in ordinary circumstances. All agreed in this: and the majority afterwards agreed, on argument amongst themselves, that there were no other words in the grant to warrant the extension of the right to cases of treason; and, by consent of all, judgment of treason is pronounced, but in the milder form; omitting, that is, the frightful particulars which made part of the sentence which was so often carried into execution, on the traitors of much later times, *ex gr.*, General Harrison, Algernon Sidney, Charnock, Dammaree, and others. Plainly, therefore, this is not a capital case, which might have come on to be tried before some of the judges whose opinion was sought. All that they could have

¹ See and compare the accounts Year-book. 1 Hen. VII., fol. 32, pl. 15; fol. 25, pl. 1.

been called upon, at any time to do, was to construe the charter of sanctuary, not to try the prisoner on evidence before a jury. The case, therefore, must be considered altogether to fail as shewing a refusal to give an opinion to the Crown; and we repeat there is no proof whatever that the judges have, in any age, thought themselves warranted in withholding their advice. As to the antiquity of the practice, we may mention that a statute of Edw. II., notices, and so far gives a parliamentary sanction, to it.¹ Then, such is the weight which has been attributed, at all times, to the judicial opinions of this class, that some accepted and unquestionable constitutional doctrines rest on no other foundation. The principle, that the devolution of the Crown on an attainted person purges all consequences of the attainder, stands upon an extrajudicial response of the judges made to Henry VII., immediately after the battle of Bosworth Field. It is, and ever since has been, the undoubted principle of the constitution; and the statement of it by the judges has received the approbation of Lord Bacon, who calls it "a grave and safe opinion and advice mixed with law and convenience."²

It only remains to notice one specious argument that has often been urged, on this subject, by writers who have, perhaps, more acquaintance with the art of building paragraphs than with the investigation of facts. What can be more improper, it is said, than to require from the judges an extrajudicial statement of the law relative to matters that may come before them in their judicial capacity? But this reasoning would prove too much unless it be meant to say what has never yet been expressed, that the judges ought never to advise the House of Lords when required. Every session it happens that the Lords, either when sitting in their judicial or legislative capacity,³ require the opinion of the

¹ Stat. 17 Edw. II. Stat. 3, De Terris Templariorum, A.D. 1324.

² *Bac. Hist. Hen. VII.*, p. 13, Edit. 1641. See Year-book 1 Hen. VII., fol. 4, pl. 5. The practice of the Persian kings was to consult the judges on critical occasions. In Herod. Bk. III., cap. 31, is a curious instance where, on a very delicate occasion on which Cambyzes consulted them, they gave advice, which Herodotus, like Bacon in the above case, designates as consisting of *αἰεὶ δίκαια καὶ ἀσφαλεία*.

³ In *Re Islington Market Bill*, 3 Cl. & F., 513, is an instance of the judges being required to advise on a legislative measure.

judges; and in many of these cases it is impossible to affirm that the same question may not, at any period of their lives, come before the judges again when sitting at *nisi prius* or in *banc*.¹

May we not then say, as the result of this (we fear too long) disquisition, that the practice of giving to the sovereign extra-judicial opinions is perfectly constitutional; in performance of a duty which the constitution imposes on the bench as one of the councils of the Crown; in discharge of the oath which the judges take; in accordance with the practice, never in any recorded instance departed from, of the judges in all ages; never forbidden by any law; and liable only to objections which apply equally in kind to their advising the lords, a practice, on all hands, allowed to be most salutary? It is true the one case affords opportunity of arousing the popular jealousy of the power of the Crown, and so bringing into suspicion the character of the judicial body, which the other case does not afford; and this, we fear, has been the only reason why the one case has been so vigorously cried out against, whilst, in disapprobation of the other, not a voice has been raised.

Readers of English history, written as it has of late been, especially the students of those portions of it which, being intrinsically the most interesting, have gained tenfold attraction from the rhetorical manner in which they have been treated, must almost necessarily arrive at a conclusion—finding no language but that of vituperation used when there is occasion to mention a judge—finding no single instance of testimony borne to the merits of the bench of judges—that, whenever a tyrant succeeded to the throne, or an arbitrary government sought means to trample on the subject's rights, there never was wanting on the bench a supply of men fit and willing to do the business; that, in fact, English judges have always been *adulatores, servum pecus*: the only difference between the judges of a good reign, and the judges of a bad one being this, that circumstances did not arise in the one to develop and call into the light the baseness innate in the body, but did arise in the other. No power of expression would be adequate duly to express our

¹ See Fortesc., R. 388.

regret to find the people of this country and of America, taught in the most fascinating form, that a masterly narration and all the grace of words can produce, to think of the body of British judges, as of men ever eager, when popular rights are under attack, and the times are times of crisis and peril to the subject and to the constitution, to shew enmity to the popular cause, and a tendency at least to join the opposite ranks and support and countenance oppression and wrong.¹ In the same reigns in which the gross instances of judicial misconduct are painted (the lights and shades being so managed as to produce effects the most impressive) in burning words, that hardly can be effaced from remembrance, no indignation is expressed, no anathemas are fulminated against the monstrous outrages on liberty, which at the very same time were perpetrating, under the name of privilege, by orders of the houses of parliament; yet the quantity of mischief thus done, the extent to which popular rights were violated, will assuredly be seen, whenever the history of privilege comes to be fairly written, to be not less and no less deserving of condemnation, than the quantity and extent of the mischief which has been attributed, and, it must be remembered, not proved to be due, to "the servility and baseness of hard-hearted, unprincipled judges." In cases of crime we are aware it is no plea in extenuation to urge the criminality of others. One body of men cannot, when put on their trial, exculpate themselves by alleging the crimes of which other bodies, in different spheres, have been guilty. But the objection still deserves an answer; why is it that, of all constituted bodies of the times of the Stuart kings, you hold up to general odium the judges? Why select for disparagement the body, of all others in the state, which it is most important for the cause of order, and for the peace and safety of the state, that the subjects should hold in veneration and esteem? According to what principle of historical writing is this figure left alone upon the canvass; so delineated as to catch the eye exclusively, other figures, in reality belonging to the picture, being either absent altogether, or, if touched in, yet treated so slightly, and kept so far in the distance and in the shade, as to solicit no attention?

¹ See Lord Macaulay's *Hist. Engl.*, Vol. I. pp. 89, 91, 96, 220, 226, 237. Vol. II. pp. 82—85, 274, 375, 3rd. edit.

Beyond all question, the conduct of some few, and very few, of the judges under the Stuart kings was, if we rely literally on the statements of it which have come down to us, most atrocious; but it would be difficult, we think, to define the valuable purpose that is, at this time, to be served, by dwelling upon that disgusting mass of crime, whilst the evil of it may not impossibly prove of wide extent. In a country where the operatives in mines and factories are in the habit, as appears from reports of inspectors, &c., laid before parliament, of reading translations of Plato's Republic, for the sake of the arguments to be found there in favour of socialist views of life, it is not wholly unreasonable to conceive that there may be many persons who will be but too ready to gather, from such descriptions of the administrators of the law in times past, the generalizing inference—"this is the kind of men that the aristocrats set over us, committing to them our lives and our little properties, and calling upon us never to name or think of them but with low reverence and unlimited respect;" nor can such consequence be deemed, we think, too remote, if it be considered that no caveat is entered against such inferences being drawn, much less does any warning, arrayed in the lavish pomp and strength of diction with which the vice of those times is portrayed, deter from supposing that it may also have subsisted in later times, albeit in an occult and latent form. Then as there is no utility, so also we feel there is no pleasure, in reproducing, in the face of day, these turpitudes. Rather would every Englishman do well to deem these as the shameful parts of the national being—the parts which nature bids to conceal.

At any rate, nothing would have been lost of truth—something, perhaps, would have been gained—if, in contrast to the foul colouring that it was necessary to depict some instances of judicial conduct in, some such scene as this had been drawn, showing that all was not base, servile, timid, and wanting in independence amongst the judicial body of those times.—Certain judges give a decision in the course of deciding a case before them, with which the House of Lords choose to be dissatisfied. Accordingly, adopting a course wholly at variance with the constitution, and with the vital principle of all good government, which lays down the necessary independence of the judicial upon the legislative body, they

resolve to call upon those judges to give an account of the grounds on which that decision was made. This was in 1628. Sir William Jones is one of the judges summoned to the bar for this purpose. He asserts his constitutional right as a judge; he states his responsibility to God and his conscience for his conduct on the bench. He adds, "I am myself *Liber Homo*. My ancestors gave their voice for Magna Charta. I enjoy that house still which they did. I do not now mean to draw down God's wrath upon my posterity: and therefore I will neither advance the king's prerogative, nor lessen the liberty of the subject, to the danger of either king or people." These are not slavish tones. The speech was made, it is true, in opposition to a power which the House of Lords, not the Crown, was attempting to usurp, and which there would be a difficulty, we apprehend, in finding any one at present bold enough to say that the House of Lords possesses; but is that a good reason why no mention should be made of the fact, or is the incident kept from the light because it would tell not to the disadvantage of a judge? The year after, Sir Thomas Richardson, then Chief Justice of the Common Pleas, subsequently Chief Justice of England, conveys to the king the unanimous opinion—an extrajudicial opinion, be it observed—of all the judges, that torture is not known or allowed by the law. Let us not forget, that it is so is due to the judges—no statute had made that the law: it is due to the judges that there is not to be found now remaining, we believe, among English archives, a single warrant for inflicting torture on an Englishman, though there have, unhappily, been cases in which Englishmen have been tortured; but it is due to our judges that this country was delivered from that badge of slavery so much earlier than some others, Scotland for instance. For the infliction of torture in Scotland, there do remain in the State Paper Office in London two warrants signed by William III.

To those among our readers who feel the importance of obtaining sound views on the conduct of the judges in critical periods of history, and who are not averse from the trouble of such investigations, we need make no apology for proceeding to advert to some events which we believe to have been more thoroughly misrepresented than any other passages in the English annals. The

proceedings against Eliot, Hollis, and others, in the commencement of the reign of Charles I., are the proceedings we mean. Soon after the dissolution of the third parliament of that reign, Sir John Eliot, Denzil Hollis, and some others, late members of the House of Commons, were committed by warrant under the sign-manual. They were brought up before the King's Bench by *habeas corpus*; their case was fully argued, and the judges of that court, seeing that they were entitled to be bailed, at once wrote to the king stating that this must be done, but suggesting that his majesty should give directions that they should be so. The court took time to consider, and appointed a day on which judgment would be given, but the king refused to allow the prisoners to appear on that day. What is the mode in which Mr. Hallam thinks it right to represent the course taken by the judges of the King's Bench? "The judges, timid and servile, yet desirous to keep some measures with their own consciences, or looking forward to the wrath of future parliaments, wrote, what Whitelock calls, 'a humble and stout' letter to the king, that they were bound to bail the prisoners, but requested that he would send his direction to do so."¹

Now, Sir G. Croke was one of these judges, and his conduct on Hampden's case certainly proves him, at least, not to have been a person of whom either timidity or servility can be predicated with any regard to decency. Of Sir William Jones, another of these judges, we have already spoken. Next, let us endeavour to place ourselves in the situation of the Court of King's Bench. The sovereign had rashly done an act entirely illegal. In fact, it was a choice of difficulties which they had before them, either, namely, at once to declare that there was no ground to detain the prisoners, and to take bail, or to give the king the only means that was open for him, of getting out of the embarrassment which he had brought upon himself, by taking a course which would have had some shew at least of grace about it, according to the suggestion that they offered. They had no reason to be sure, it must be remembered, that the king would have complied with their judgment if they had pronounced it at once; and his subsequent conduct in refusing to allow the prisoners to be brought

¹ Hall. Constit. Hist., p. 422, 5th Edit.

up for judgment, shewed that such a surmise would not have been unfounded. On the whole, it cannot be doubted, we think, on a calm examination of the case, that the judges acted, in the distressing and novel circumstances, at once so as to satisfy their duty, and to do the best for the interests of the prisoners. At any rate, the spirit of indiscriminating censure and suspicion in which the above passage seems to be conceived, would, with equal justice, lead the writer to the conclusion, in case the Court had immediately ordered the prisoners to be bailed, that they did so, "looking forward to the wrath of future parliaments." In fact, Mr. Hallam is less able to see any thing righteous, in the conduct of the Court, than the men of their own generation, excited and sour as the temper of the times was. When the Long Parliament took up this affair, and voted that Chief Justice Hyde and Mr. Justice Jones had been guilty of a delay of justice in respect of the course taken (which was the act of the whole Court), they made an exception as to the two other members of it, and resolved that those others, Mr. Justice Whitelock, namely, and Mr. Justice Croke, were not guilty. No doubt the resolution is a self-stultifying one; but that it is so, does not the least tend to shew the case to be free from perplexities. The real nature of another proceeding against Sir John Eliot and Denzil Hollis, along with Benjamin Valentine, has perhaps been more completely misrepresented than in the case of most other transactions in history. We refer to the information against those gentlemen for their conduct, in the House of Commons, on the last day of the session of the third Parliament, in assaulting the speaker Finch, and forcibly holding him in the chair until some well-known resolutions were passed. Mr. Hallam states it thus: "The attorney general . . . exhibited an information against Sir J. Eliot for words uttered in the House, namely, &c., and against Mr. Denzil Hollis, and Mr. Valentine, for a tumult on the last day of the session." Now, on referring to the record of the information and proceedings,¹ a slight examination will suffice to convince every one of the error of this statement—whether the information is drawn in the most artistic manner perhaps may be doubted, but that is a question foreign to the matter in hand. Mr. Hallam

¹ 3 Howell's State Trials, 320; Term. P.C., 294.

has probably been led into the mistake from finding the article in Howell headed in these words, "Proceedings against Eliot, Hollis, and Valentine for seditious speeches in parliament." But it will be readily discovered upon examination of the record, that the words which are attributed to two of the three members only, are set out by way of inducement: "the charge was for conspiracy, seditious acts and practices, to stop the adjournment of parliament, which may be examined out of parliament." This was stated by the Court as reported by Sir George Croke, who was one of the Court,¹ and the Court overruled the plea to the jurisdiction, on the ground of privilege of parliament, and held that the Court might take cognisance of such acts and punish them. "Afterwards, (the report goes on) divers rules being given the defendants to plead, and they refusing, judgment was given against them," &c.

Now it signifies little or nothing that in the Long Parliament the Commons voted that the overruling the plea to the jurisdiction was illegal, because it is settled, we may say, to be beyond the competence of either House of Parliament to declare by resolution what is or is not the law; that can only be done by Act of Parliament. "But (Mr. Hallam proceeds) the subject was revived again in a more distant and more tranquil period. In the year 1667, the Commons resolved that the judgment given, 5 Car. 1., against Sir John Eliot, Denzil Hollis, and Benjamin Valentine, is an illegal judgment, and against the freedom and privilege of parliament. To these resolutions the Lords gave their concurrence, and Hollis, then become a peer, having brought the record of the King's Bench by writ of error before them, they solemnly reversed the judgment."²

Now it is to be observed that the King's Bench in ruling as they did in this, followed the law as laid down, by all the judges, on two several occasions in this reign, to the effect that a member of parliament may be punished out of parliament for things done in parliament, not in a parliamentary way, and exorbitantly, for that these are not the acts of a court.³ And a case is mentioned

¹ Cro. Car., 182.

² Hall. Constit. Hist., 425.

³ 2 Parliam. Hist., 506, 521.

in which the judges in 8th Elizab. ruled that offences committed in parliament may be punished out of parliament. Even Mr. Hallam admits that in the possible case of treason or felony, and many smaller offences done in parliament, the punishment must lie with the courts of law. Nor can any one doubt, with respect to the well-known occasion of Mr. Burke's throwing a dagger on the floor of the House, that, if the dagger had wounded any one in its flight, an action would have lain at the suit of that person against Mr. Burke, and his plea of privilege would have been inoperative. There is no possibility, therefore, of concluding for the immunity of offences against the law, although the floors of the Houses of Parliament may be the scenes of them. Now, let us see what was done about the reversal of this judgment in the tranquil times of 1667, and whether in truth that is "an important decision with respect to our constitutional law, which has established beyond controversy the great privilege of unlimited freedom of speech in parliament," as Mr. Hallam designates it.¹ Also we shall see with what degree of solemnity the judgment of the King's Bench (who, it is to be noted, did not, as is most obvious, conceive themselves to be adjudicating any thing relating in any way to freedom of speech in parliament) was overruled in the House of Lords. In making this inquiry we shall not take for guide the State Trials, which it has often been declared are of no authority as reports in the courts of law, but refer solely to the Lords' journals to learn what took place.—Taking up the 12th vol. of the Lords' Journals, under date 11th Dec., 1667, page 166, we find the vote of the House of Commons communicated, and that the said vote, that the judgment was erroneous and illegal, was sent up to the Lords for their concurrence. To this vote they agree; and then an order is made reciting that the judgment is *found* to be erroneous; and then they direct the said Denzil Hollis, now Lord Hollis, to cause the roll of the King's Bench to be brought before the Lords in Parliament by writ of error. All this is before seeing the record—before they had judicial knowledge what the judgment was; without argument they vote it to be illegal and erroneous!

Then, Feb. 10, 1667, the Earl of Dorset moves that Lord

¹ 1 Hall. Const. Hist., 425.

Hollis would be mindful of bringing in the writ of error for reversing the judgment formerly in the King's Bench, &c., "and his lordship (the Journal proceeds¹) promised to expedite the bringing of it in what he could."—Then, Feb. 24, 1667, ordered that, as the Chief Justice of the King's Bench is now gone circuit, the next ancientest judge of the said court now in town, is hereby appointed to bring into this house the record of the King's Bench Court, wherein the judgment is entered against the now Lord Hollis.—Feb. 26, 1667, this day Justice Windham, the ancientest judge of the court of King's Bench now in town, brought into this house, in the usual manner, a writ of error to reverse a judgment given in the court of King's Bench, &c.—March 9, 1667, this day the Lord Chief Justice of the King's Bench, in the usual manner, brought in the writ of error to reverse a judgment given in the King's Bench, 5 Car. 1, &c. On which there is a memorandum appended to the entry of Feb. 26, that thereupon Justice Windham's endorsement upon the writ was cancelled.—March 13, 1667, the errors ordered to be argued on April 8, instant.—April 8, 1668, the argument put off till the 15th.—April 15, 1668, the judgment is reversed. The error assigned was, that there ought to have been two judgments, one for the words, and the other for the assault, &c., and that the single judgment was erroneous; and for the said error, and other errors apparent on the record, the judgment is reversed.

Probably few of our readers would like to call these proceedings regular, much less solemn. At any rate it is impossible to call this a *precedent, establishing beyond controversy the great privilege of freedom of speech in parliament*. There is in the possession of the Royal Society of Antiquaries, a contemporaneous manuscript report of this case, which in some respects is more full in giving the judgments, and more careful in the statement of the authorities cited, than the printed case, and its effect is to confirm the above view, and to show the judgment of the Court to have been given as on a charge of conspiracy. Among the authorities there cited, is the Bishop of Winchester's case, Year-book 3 Edward

¹ 12 Lords' Journal, p. 181, and subseq. pages; see also Cro. Car., 181, 604, 4 Torbuck's Debates, 153, 154.

III., folio 19, pl. 32, which is especially curious as shewing that the main points made for Eliot, &c., were then pressed and overruled; viz., that things done in parliament were not cognizable in the King's Bench, because parliament had jurisdiction of all things done in parliament, and that things done in the higher place could not be judged in the lower place. Reference is also made to Fitzherbert's *Graund Abridgment*, tit. Corone, pl. 161, as shewing that, in the time of Henry VIII., it was held not to be the law, that in all cases things done in parliament were beyond the jurisdiction of the courts of law.¹

This article has already extended to a great, but we trust, the importance of the subject being considered, not to an unreasonable length; but we will examine one other case which has been so represented as to throw doubts on the integrity of the judicial bench. Mr. Hallam pronounces the judges to have strained the law on the occasion of Sir Harry Vane's trial after the Restoration,² and says—"The condemnation was very questionable, even according to the letter of the law; it was plainly repugnant to its spirit. An excellent statute enacted under Hen. VII. . . . assured a perfect indemnity to all persons obeying a king for the time being, however defective his title might come to be considered when another claimant should gain possession of the throne. It established the duty of allegiance to the existing government upon a *general principle*; but in its terms it certainly presumed that government to be a monarchy." Now the letter of the statute is, "That all persons that attend upon the king and sovereign lord of this land for the time being, *in his person*, and do him true and faithful service of allegiance . . . for the said deed and true duty of allegiance, he or they shall be in nowise convict or attaint of high treason," &c. The reader must judge whether this language is easily susceptible of the construction attempted. What was the meaning of allegiance, as the word was understood at the time of the passing of the act? Why, surely the feudal sense in which it was solely applicable

¹ See also the Earl of Shrewsbury's case, 9 Rep., 51, third point, where the Court says, If an action hath sufficient matter, although it hath also matter in parliament, yet it shall be maintainable.

² 2 Hall. Constit. Hist., 25.

to a person. Nobody in those times would have spoken or thought of allegiance to a government. To put such a construction on this statute as would extend it to the case of an adherent of an anti-monarchical government, would have been to put such a construction as never was before or since put upon the words of any other statute. Vane had taken the oath, "to be true and faithful to the Commonwealth of England without a King or House of Lords." Already, before this trial, all the judges, after argument and conference together, had determined the construction of the statute. The obvious construction they all resolved to be the true and legal one. The same had also, before this trial, been again declared to be the law, in the case of the regicide Cook, by the Lord Chief Baron and seven of the judges. That there was nothing new in this construction, is well known. When Cromwell was urged by the Chief-Justices of that time, Glynne and St. John, by Lenthall the Master of the Rolls, Whitelocke, and others, to assume the crown, considerations, grounded on this very construction of the statute, were pressed among other reasons.¹ The House of Commons, not the King, ordered the prosecution; but, assuming the King would have been satisfied with nothing but Vane's blood, he remitted the whole of the barbarous part of the judgment for treason. Vane was only beheaded;² and, assuming Hale and the rest of the judges to have been wicked enough, what was there to tempt them, to put a false gloss upon the statute? At the Restoration, the judges received their appointments *quamdiu se bene gesserint*, and so were entirely independent of the Crown.³ Even on Mr. Hallam's construction, would not Vane fall within the proviso? "Provided always that no person or persons shall take any benefit or advantage by this act, which shall hereafter decline from his or their said allegiance," viz., to the government for the time being, on Mr. Hallam's construction. But it is well known that Vane

¹ 6 Lord Somers's Tracts, 346—401. The judges of Queen Mary's time took the same view of the statute in Lady Jane Grey's case.

² 6 How. Sta. Tri., 132, 133.

³ Siderf. R., 2; and see observations of Lord Hardwicke, 3 Harris's Life, 237. This fact contrasts curiously with that of the extreme reluctance of Will. III. to consent to the Bill for making the Judges' commissions un so in future.

obstinately refused allegiance, adherence, or even recognition, to the later forms of the government of the interregnum. Neither Coke nor Bacon, Comyns nor Blackstone, nor, we believe, any legal authority, sanction that interpretation of the words which commends itself to Mr. Hallam's judgment. In short, the statute of Hen. VII. was passed to save certain persons from the pains of treason; by treason was then understood treason under the statute of Edw. III.; but that statute had always been interpreted, as far as regards the present purpose, of a crowned head.¹

The judges of the Restoration were independent of the crown, we have remarked, because their commissions were granted during good behaviour. Such letters-patent could only be revoked or cancelled upon a *scire facias*, a proceeding under which it would have been necessary to convince a jury, of the defendants having done some act, amounting to a legal cause of forfeiture. The practice previously to that era was far from regular either way. Mr. Foss indeed has shown, by numerous instances, that it was altogether capricious; sometimes one or two of the judges of the two benches were appointed for life, the rest holding at pleasure; sometimes, and this was the more common case—none held for life. The nearest approach to a rule was observed in the appointments in the Court of Exchequer, where the Chief Baron was mostly commissioned for life, the puisne barons nearly always. Looking therefore at the fact, that the noblest maxims of our law, and some of its strongest claims to the title of a law of liberty, are due to judges who held their places at the will of the sovereign—in times when parliament had no voice in such matters, and before the birth of public opinion—it is impossible, we conceive, not to be filled with admiration for the independent spirit, and the lofty sense of duty, that was displayed by the judicial body. Yet somehow our history, as it has been written, fails to shew any trace of these unquestionable facts. In every variety of form delinquency has been imputed to the judges of the Stuart reigns—their servility, their want of independence, are unceasingly displayed; but we seldom hear much mention of Sir John Walter, Chief Baron of the Exchequer, appointed in the first of Charles I., with a patent during good behaviour, and

¹ 3 Inst. 8; 1 Hale, P. C., 106, 107.

who, having fallen under the king's displeasure, was forbidden, in the fifth year of the reign, from exercising the office. His patent, however, he steadily refused to surrender except on *scire facias*, and he continued Chief Baron until his death. In the second year of the reign, Chief Justice Crew (the terms of his appointment nowhere appear, so far as we are aware) was removed for refusing to sanction the illegal forced loan, losing thereby income, to the aggregate amount of £26,000, as estimated by Hollis, in the House of Commons, according to what he calls "a just calculation," on the fourteen years that the Ex-Chief Justice lived.¹ A similar case to that of Chief Baron Walter was that of Mr. Justice Archer, removed in Hilary Term, 24 & 25 Car. II.² How numerous the removals were in the reign of James II. is known. Yet to find any of these proofs of integrity and independence duly commemorated in history would be, we suspect, a task of some difficulty. Here we arrive at a notable objection to the theory of the normal condition of servility that is attributed to the judicial body. The executive, at no period of our annals, has acted as if that servility could be counted on: it has in very many instances found it necessary to punish manifestations of a contrary spirit in the judges; it has exhibited the most extraordinary reluctance to part with this power of punishment.

In 1680, the House of Commons resolved "that a bill be brought in, that the judges hereafter to be made and appointed may hold their places and salaries *quamdiu se bene gesserint*; and also to prevent the arbitrary proceedings of the judges." The last clause referred to a practice of the judges (previously complained of in the House), which consisted in their having enforced equally certain fines, which the existing laws purported to impose equally, on Romanist and Protestant Dissenters from the Established Church; the House desired, at that time, to see only the first class punished. Nothing further came of that bill, owing, it seems probable, to the influence of the government; and it was not until 1691 that the subject of the judges' places was revived, by a bill for establishing their independence which passed both Houses, and was presented for the royal assent, but William III. gave it his

¹ See 3 How. Sta. Tri., 1298.

² Sir T. Raym. R., 217.

veto. In the last year of his reign the object was accomplished, but only by means of a kind of tack to the Act of Settlement of the words, "That after such limitation shall take effect as aforesaid, judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament, it may be lawful to remove them." So valuable an improvement in the institutions of nations has perhaps never been made by fewer words; but few as they were, they had the effect of postponing the benefits of the change until the accession of the House of Hanover; such was the jealousy of the then royal family upon the point. How the machinery of a joint resolution might work in times of great political excitement it is difficult to predict. Certainly the journals show cases of joint resolutions agreed to, in such times, which are any thing but consistent with equity. The framers of the North American constitution, perhaps, took a course less liable to abuse. That constitution provides that the Federal Judges shall only be removable on conviction before the senate, on the impeachment of the House of Representatives, of malversation in their offices. By the French constitutions of 1791 and 1795, the judges were made irremovable, as they were in the constitution of 1799, and under the charter of 1814. They were also appointed for life by the constitution of 1848; and Louis Napoleon, soon after he came into power, decreed the irremovability of the judges until the age of seventy, adopting in this respect the constitution of Connecticut.

A multitude of facts and considerations remain to be treated; the subject is far from exhausted by what has been advanced.

"Sed nos immensum spatiis confecimus æquor,
Et jam tempus equum fumantia solvere colla."

We cannot, however, forbear adding the expression of our belief, that it is quite impossible for any one to survey the long line of the early English judges, as displayed in Mr. Foss's volumes,¹ to reflect on the insecurity of their positions during the period embraced therein, and the inadequacy of their remuneration, and then fail to glow with pride as he discovers, out of the many hundreds of names, fewer than half-a-dozen to which attach the

¹ The work as yet only comes down to the year 1660.

stigma of having yielded to corruption. None of the practices of the old parliaments of France have ever been charged upon English judges: *pots de vin*, *epices*, *comfites*, *avaleurs de frimars*, or their equivalents, have ever been unknown in our courts. Many centuries before an administration of equal justice as between noble and *roturier*, and especially as between sovereign and subject, was a thing known in France, or indeed any part of the continent of Europe, the judges here were laying down such grand doctrines as these:—The law of God and the law of the land are all one, and the one and the other prefer the common and public good of the land.¹—The common law hath so admeasured the King's prerogatives, that they shall not take away or prejudice the inheritance of any.²—Arbitrary imprisonment is unknown to the law.³—The air of England is too pure an air for a slave to breathe.⁴—A royal proclamation is incompetent to make new law, or to impose fine, forfeiture, or imprisonment.⁵—The King's grant is of no power to prejudice the subject's interest.⁶—No statute is to be extended to life by doubtful words.⁷—These are not the principles of servility. They were repeatedly asserted, and they were all of them finally established in practice, by the courts, unaided by parliament, and in times when the occupants of the courts occupied as tenants-at-will of the crown.

We cannot believe it to be other than an ennobling contemplation, this survey which we have been making, of generation after generation of our judges handing down to one another these lofty principles, and this undimmed purity of conduct, thus recalling the ancient allusion to the *λαμπαδηφοροι* of the Attic games, *καθαπερ λαμπαδα τον βιον παραδοντας ἄλλοις ἢ ἑαυτων θειραπεινοντας ἀει θεους κατα νομους*.⁸

¹ Finex. C. J. Keilw. R., 191 a. ² Berkeley's Case, Plowd. Com., 236.

³ Year-book, 22 Edw. IV, fol. 37, pl. 21. Year-book, 1 Hen. VII., fol. 4. Plowd. Com., 235. 1 Anders. R., 152, 297. Hob., 61.

⁴ Cartwright's Case, decided 11th Eliz., 2 Rushw. Collect., 468; see 20 How. Sta. Tri., 51.

⁵ Dalison's R. 20, pl. 10, 3 Philip and Mary; see 12 Rep., 74. 2 How. Sta. Tri., 723.

⁶ Yearb., 13 Edw. III., fol. 40.

⁷ Courteen's Case, Hob. 270.

⁸ Plato, Leg. vi. s. 18, Edit. Bekker.

ART. V.—THE MECHANICS OF LAW-MAKING.

PARLIAMENT AND THE STATUTE LAW COMMISSION.

AT the very threshold of every act of legislation lie the questions, What is the state of the law and what the grievance? What the expedients to which recourse must be had to make an effectual remedy? What the expedients which it is politic as well as practicable to use? and What, therefore, the specific purposes of the measure, and the exact resolutions and instructions by which that measure is to be introduced, and the particular provisions by which those purposes are to be realized?

Again, as in oratory, poetry, and every form of expression of thought and purpose, the question also arises, as to what is the form which is most convenient to use?

Many of the difficulties that beset our course through the in-organization of Parliament and of parties, and also the course of operations, which really, if not avowedly, must be taken in regard to each single instance of legislation, we set forth in the article entitled "Legislative Predicaments and Processes," published in our last number.

We then remarked, "It must be reserved for another opportunity to shew the great scheme or outline of the end to be obtained, as well as the moulds or models to be used by the workmen, by which the utmost attainable simplicity and intelligibility may be accomplished; so that the legislator, judge, officer, lawyer, and common person, may each see that law which it concerns him to know, in the shape in which he specially needs it, and, at the same time, in a shape coherent with the main body of law, and calculated to give it not one but all the aspects in which law has to be regarded, without confusion or repetition, and without bringing to view more than the special user of the law requires for his purpose."

The above sentence implies many distinct conditions, each of which is essential to the end, simplicity and intelligibility—in other words, accessibility; each of which is essential to the basis of

operations, whereon the legislator and his counsellor and draftsman are to work, if they are to work in agreement.

Much of our law fails, because no two lawyers are agreed, either as to the basis of operations, or as to the instrumental means and processes of legislation.

If two are employed, one junior and the other senior ; the junior more intimately informed, and the senior more authoritative ; the latter may by a stroke of his pen "settle" the draft bill, by striking out from the word "whereas" in the preamble to the last word, and substitute an off-hand epistolary style ; and there is no one to say him nay, and no standard to which to appeal.

It is supposed by some, forgetting that the product is to be an act, not of the draftsman, nor of the member, nor of the minister, nor of either branch of the legislature, but of the whole legislature, that each law must be written after each man's own manner ; and that there is no possibility of presenting a common uniform standard.

And in very hopelessness both Houses pass measures because they have not any recognised principles, nor even any authoritative statement of law or grievance on which to base their objections, or their suggestions.

At the meeting of the National Society for the Promotion of Social Science, which was held at Birmingham in 1857, a paper was read, "On the Recodification of the Law, for the purposes of promulgation, administration, and legislation," in which it was shown by what logical structure of legislative instruments (founded on the universal premise that law must needs relate to persons or personal entities, and that in all essential particulars the conditions of such person and personal entities were the same) the law could be made intelligible, and interesting too, to the people ; and if to the people, to the administrative officer, judge, or other ; and if to officer, judge, or other, to the legislator.

The same topic was pursued in a more practical way in a paper read before the National Association for Promoting Social Science, at its recent meeting in Liverpool.

In this paper, the author shews that registration must be the basis of all our attempts at consolidation and codification,

registration on uniform methods, reaching every personal character known to the law; and he points out how, by using the public functionaries according to their very offices, and who are richly endowed with some specially organized and trained assistants, the whole work may be done at starting with completeness, and renewed in the ancient praetor-like manner, year after year, to the common advantage of the people, and their representatives and agents, and to the sovereign and the public authorities.

This branch of the subject we shall not touch upon more particularly, as our readers will probably have the opportunity of reading it *in extenso* in the published "Transactions of the Society for Promoting Social Science."

We shall confine ourselves to the appendices which were not read, but referred to only cursorily.

These papers constitute the proposed basis of future legislation.

They are entitled "A Rough Sketch of a State Register of the whole Body of Law of the United Kingdom of Great Britain and Ireland; or, first rough draft of the Victoria Code, with a view to form the basis of future Legislation, and the means of Parliamentary Revision of current Legislation, and the Registration thereof."

Also, "Rough Draft of Exemplification of the Structure, the Matter, the Ordering of the Matter, the Verbal expression and the Typographical expression of Legislative Instruments of every kind, Code, Consolidated law, General law, Special General law, and Individual Special law, Institutional, Constitutional, Doctrinal, Directory, and Functional, and of all the Parts thereof."

These exemplifications include the headings, titles, abstract, outlines, marginal notes, preambles of all sorts, expressions of enactment, special provisions, special general provisions, transitory provisions, explanatory provisions, schedules of all sorts, and the divisions, parts, chapters, sections, clauses, paragraphs, sentences, phrases, and words of all other parts of the structure, from the most leading to the most minute.

They also include all the ingredient matters that enter into the composition of the very substance and effect of each legislative provision; and, furthermore, the logical order of such matters within the whole law, and each part of the law; that is to say, the composition, apart from expressions, of all persons, personal

entities, individual, collective, and aggregate, exhibiting their organization and relations.

Then the literary composition or verbal expression of the matter, and lastly the typographical expression or forms for distinguishing the matter, to such extent as the wisdom of Parliament shall think fit to adopt that form of convenience.

It is proposed to arrive at these scientific and artistic results by the same process by which other sciences and arts have attained their successes ; that is, by the methodical collection of all past illustrations, and the assimilation of them to that standard which shall be deemed most applicable.

And in the mean time to offer, by way of suggestion, the considerations that should determine the selection of the most appropriate.

Much has been done in a bye manner, here and there, in the introduction of improved methods, but without much reference to a distinct purpose and a decisive principle.

The author of these papers deems the object of law, its pertinence to the persons whom it affects, and their converseance with it, the first thing to be regarded, and that it should be characterised by unity, uniformity, propriety, comprehensiveness, and completeness ; in one word, simplicity.

He proposes to arrive at this result by throwing all the heterogeneous matters which relate to each person, or personal entity, into one form, consisting of the heading, the abstract, the title, the special provisions, the special general provisions, the transitory provisions, the explanatory provisions, and the schedules.

And having, by exhaustive indexing, obtained, with reference to each person or personal entity, a complete register of the law relating to such person or personal entity, he proposes to collate all the registers of law which relate to the individual persons belonging to the same species, and to eliminate all provisions which they have in common, casting such eliminated provisions into a special law ; and then performing the same process in turn with the general and the common law, to find the universal law or principle.

Having so reached the fundamental results, he proposes to reverse the course ; and, beginning with the universal law as the

foundation, to engraft thereon in succession, by way of exception or special development, the common, the general, the special, and the individual law, following uniformly the same method of analysis, and omitting whatever finds its place appropriately in any higher, or in any inferior law.

As every person fulfils many characters, his acquaintance with law as it regards each of them (that law being always written on the same mould, and that mould a natural not an artificial one), he will almost necessarily become acquainted with the essential elements and conditions of law as it affects other persons and their characters; he will have, without knowing it, or aiming at the result by painful logical analysis, an intimate knowledge of the relations which are the subjects of law.

By placing all law in its place in the system of law, and marking, by fit typographical means, its quality as universal, common, general, special, and individual, he will insensibly become familiar with the whole law.

If what is pertinent to doctrine, to tribunal, to procedure, to pleading and proof, to form, be separated, he will not be puzzled in the transaction of business with matters with which he has no immediate concern.

Above all, looking at law as it affects his interests and his predicaments, he will be indifferent in fact as he is indifferent in feeling to the distinctions of common law, of equity, of ecclesiastical law, of property law, of criminal law, and all those distinctions of law which have come to have a nominal difference, from being the object of care to distinct tribunals.

The papers which contain the outline represent a series of fourteen Registers and ten detailed Supplements, making on the whole twenty-five parts, each of which is again divided into a certain number of divisions (seventy-five in all), covering the entire field of administration, public and private, and consequently the entire field of law and legislation.

On this head the author says: "In addition to the main objects, the above arrangement has two purposes, that of the registration of matters of law and administration, and that of the classification of the statutes, and of the administration of the law in relation to the statutes. The basis of the arrangement for both purposes is

the same, the matter being the same, and each purpose being supplemental to the other. It is designed to meet in appropriate manners the objects of the administrator or man of affairs, and of the legislator or man of law, and to bring those personages as much as possible to a common point of view. It is in some sorts a chart of affairs, and of the legislation and law relating thereto, wherein all additions may be incorporated as we proceed, so that at every period it may shew the actual state of things.

As, of necessity, the first establishment of such a Register must be a heavy affair, the author renews a suggestion which, to some extent, he made to the select committee of the House of Commons on public bills in 136, that each public officer should make a return (1) in the form of a charge of the duties wherewith he is charged ; and (2) in the form of a calendar of the distribution of these duties within the year, and within any other official period or course of proceeding ; and (3) in the form of a roll of the persons who stand in relation as claimants, objects of his official care, or assistants, agents of his official care, arranged alphabetically, or according to rank and precedence or other appropriate relation ; (4) also in the form of a list of the actual claims and transactions within the last year ; together with (5) a chronological statement of the statutes, or parts of statutes, governing his office in any particular ; and (6) of any judicial decisions or dicta thereon, and also of (7) a digested statement of the matters of those statutes, decisions and dicta ; and (8) of a terrier of the territory or district over which the jurisdiction extends.

He also proposes that, if the returns should be in any thing inadequate or inappropriate, the officer should be requested to *add* another return, supplying the defect to the extent only of the inadequacy or inappropriateness ; and further to ascertain the extent of the forces available for this service, he proposes that a return should be made of principals of departments, and of persons educated to the profession of the law in each department.

By these means the whole body of material would be obtained in a comparatively short space of time ; and, to make it manageable, the author has prepared, in a systematic form and order, corresponding to the sketch of the State Register which he gives, a

systematic collection of receptacles, in the manner of a library, ready for the reception of the materials.

Moreover, to reduce this material into a "pulpy" state, admitting of its easy digestion and incorporation into a consolidated body of law, he indicates the ordinary action of the office which he proposes for the conduct of this operation, by which the material, as it comes to hand, may be dealt with so as at once to produce the desired result, and to preserve the materials, collected at the different stages of the process, for verifying the results.

To superintend the first collection of the matter, he proposes the addition of many important elements to the statute law commission; that it should be reinforced by assistants able in the various departments of the law; that it should form itself into committees; be assisted by a proper staff of officers; and that it should work with more publicity, and with more continuity.

He proposes to get rid of the enormous anomaly which leaves the premier and chief officers of state without adequate legislative aid; as to extraordinary measures, indeed, often dependent on eleemosynary and voluntary—not to say, untried and inexperienced, assistants; or dependent too entirely on over-worked and distracted law-officers, who cannot help them effectually, and never in due time, or in the right manner.

But the chief reliance of the author is upon the existing parliamentary officers, who, he shews, might, by a due and appropriate reinforcement of their offices, answer the reasonable expectations which their high abilities, and richly endowed appointments, entitle the people and the representatives of the people to entertain.

If the minister should be reinforced, the member should on the like principle be reinforced too, and not be expected to put his hand into his pocket to pay for assistance, which the standing officers of parliament ought to be able to afford, and which there is no doubt, from their high character, they would cheerfully afford, if they were furnished with the proper sort of assistance.

In the above short notice it will be found that every provision has been made for all the requirements of the predicament; it may be worth while to give a summary notice of the different

registers and statutes which it is proposed should form the State Register or Victoria Code.

PART I. is introductory, treating of the great whole, and of all the intermediate wholes which constitute the subject. It consists of abstracts embracing the entirety of each subject, and giving in minute detail every member and part in its due place and relation, and indicating its correlation with other matters that are co-ordinate with it, or which are placed above or beneath it in the scale of superior, supreme, and sovereign relation, or subsidiary or subordinate.

The object of this Part is, by an entire, compact, and logical exposition of the whole matter, to serve as a means both for the construction and interpretation of all the matters of which it is composed. It is to consist of Tables, marshalling all the personages of the realm, according to their ranks and condition, in close array, and all other matters of legislation, with similar generality and minuteness.

PART II. consists of a register of certain fundamental state institutions and laws; of certain fundamental public administrative institutions and laws, and of certain fundamental private institutions and laws.

In spirit and in fact, though not in specific detail, this Part embraces the whole of the law of England, and indeed the whole of every other law; for it is considered that the framework of a register and code, which in its scope is to embrace all the institutions and laws of this great empire, or at least afford the means of recording its transactions and embodying its regulations, should be of a nature to comprehend institution and law of whatever description.

This is the logical basis of the whole fabric. The other Parts are devoted to the enumeration of specific details, and the elaboration of statement in which English legislation delights, or to which probably it is compelled by the practical idiosyncrasy of the people.

PART III. embraces the constitutional laws of Great Britain. It relates to that indefinite impersonation of the State, the Crown, and to that definite personation, the Sovereign, in her various capacities; to the Parliament in its collective capacity; to the

House of Lords, its committees and officers ; to the House of Commons, its committees and officers ; to the Privy Council, its committees and officers ; to the electors and the officers of state charged with the management of the incidents of election.

PART IV. relates to the whole population at large, to the subject and alien, to persons according to age, to the male population, and to the female population.

PART V. relates to the personages, public and private, belonging to the territorial divisions and localities of the empire ; to the inhabitants of England, its counties, boroughs, cities, towns, parishes, and places not parochial ; to the inhabitants of Scotland in like particularity and manner ; to the inhabitants of Ireland in like particularity and manner ; to the inhabitants of the colonies in like particularity and manner ; to the British subjects stationed in, or trading with, or residing and being in foreign states, or the dominions thereof.

It also treats, in like manner, of the sees, or other ecclesiastical divisions and places of England, Scotland, Ireland, the Colonies, and of foreign states, so far as English persons are concerned.

And, with like particularity, it gives place to the other districts into which the country is divided ; the judicial, registrarial, poor-law, military, naval, maritime, financial, and the matters relating thereto.

These matters are shewn tabularly in parallel, so as to admit of comparison, and of due marshalling, according to their proper relations and coincidences.

PART VI. relates to matters of public right, and the conservation, administration, and assistance thereof.

It treats of the department of supreme administration, represented by the first minister and by parliament, and of the chief officers of state in their subordination to him ; of the department of public information and instruction, and of the chief and other officers in subordination to or in connection with the privy council and its president ; to the department of public justice and law, and to the lord high chancellor, and to the chief judicial and other officers in subordination to or connection with him ; to the department of public treasure and finance, and to the chancellor of the exchequer by whom it is represented, with the officers

in subordination to and connection with him ; to the department of the secretaries of state collectively, and the officers in subordination to and connection with them collectively ; to the department of the secretary of state for foreign affairs, and the officers in subordination to and connection with that department ; to the departments of the secretary of state for home affairs, and for colonial affairs, and for the affairs of India ; and to the department of the secretary of state for war, and to the officers in subordination to and in connection with those departments respectively, exhibited in each case in like form and order, so as to be considered separately and in parallel, in relation to themselves, and to each other.

PART VII. relates to matters of private right, and the protection, administration, and assistance thereof—that is, to persons, to proprietors, to commercial persons, to functionaries, to suitors of every denomination, and in every predicament, in divisions corresponding to the above enumerated designations, each person being treated separately in like manner with every other person, so as to bring their points of agreement and difference into view.

PART VIII. relates to all matters of common interest, common right, and common law, and of jurisdiction, of proceedings, of allegations, of pleadings, of evidence and forms, and the administration and assistance thereof.

It treats of all matters of a general nature, of the most general law—the law of principle, such as is usually supposed to characterise a code.

It treats of all jurisdictions, and of the general laws common to all jurisdictions.

It treats of all procedures, of all tribunals, official as well as judicial, and of the general laws common to all procedures.

It treats of all allegations, pleadings, and proof, and of the general laws common to all such matters.

It treats of all forms and acts, or instruments, and of the general laws common to all such matters.

By the development of this portion of the register or statutes, it is proposed to relieve single laws of many matters belonging in common to different laws, which, by crowding an act of parliament, serve to obscure its provisions without adding materially to their

efficiency ; and, by getting rid of an amazing amount of reiteration, to simplify each law, and make at the same time the general laws more comprehensive and complete.

PART IX. relates to all matters of official organization, the structure of establishments, the *personnel* of establishments, the ordering of the members thereof, and of the administration and assistance thereof.

It treats of administrators of all kinds and degrees, of advisers, of agents, and assistants, of clerks and register-keepers, and of attendants and servants.

The cardinal subject is functional ; disregarding the nomenclature, it aims at the substance, and purposes to point out the specialties of each function by whomsoever it is discharged.

PART X. relates to matters of special personal administration of every denomination and aggregation, such as infants, paupers, prisoners, lunatics, sick soldiers, sailors, servants, scholars, aged persons, families, households, clubs, colleges, communities, &c., &c., and the administration and assistance thereof.

This Part is divided into ten classes, relating to persons and establishments, works and buildings, plants, fittings, and furniture, provisions and clothing, carriage and locomotion, books and stationery, entertainments and charities, banks and insurance, and all those who serve us in making, maintaining, keeping, and using them.

This minuteness is necessary for the purpose of registering all the minute provisions of the statute law relating to them, and also the decisions and proceedings of courts ; the object being, not only to record the actual provisions of the law, but also the administration of it, and the dogmata and dicta of text-writers and others who treat of its practical applications.

The compiler of such a work as this is not at liberty to exclude any personage or any predicament, but must in all honesty provide a place for each. It is for the legislator to determine what application shall be given to the matters thus recorded and digested.

PART XI. relates to matters of transitory application, and the administration and assistance thereof.

A very large part of British legislation is concerned with

transitory matters, which are so mingled with the permanent as to be scarcely distinguishable. The confusion thus engendered is a main cause of the difficulty in digesting and consolidating the law, and in developing and adjusting its provisions. It is proposed to give an assigned place in every law to the transitory provisions, and an assigned organ of administration for dealing with them in aid of parliament.

PART XII. relates to matters of an explanatory nature, and the administration and assistance thereof.

This is another branch of matters of legislative confusion, which troubles every effort to improve and simplify the law. As in the case of transitory matters, it is proposed to give to the explanatory their assigned place, and to deal with them systematically. They cannot be omitted, for the idiosyncrasy of the English character delights in precise, or rather detailed legislation, and will not believe that any thing is free from doubt till the doubt be expressly excluded. The interpretation of terms will constitute an important part of this branch.

The whole should be carefully watched, by placing it in a separate compartment; it will attract attention, and, as the law becomes more compact and orderly, and with its compactness and order more intelligible, this branch will be rendered less and less necessary.

PART XIII. relates to the collection, custody, registration, and promulgation to the people of the laws, and to the conservation thereof, and to the administration and assistance of such collection, custody, regulation, promulgation, and conservation.

The whole detail of each instrument of legislation, the whole detail of parliamentary revision of current legislation, and the whole detail of instruction of the legal depositaries of law : our practitioners, advocates, and judges, constitute the subject of this division.

The author glances at an university of law, wherein the whole State Register, whole consolidated Law or Code, complete, shall be the basis of legal instruction and of legal training.

PART XIV. relates to matters of detail, affected in common by all the other registers or statutes, which it exhibits in collective forms ; of histories, states, terriers, rolls of persons, charges,

calendars, codes of instruction ; and in alphabetical indexes and concordances of persons known to the law, both by their designation, popular and technical, and by the nature of their states and functions ; of transactions ; of statutes and other authorities ; of judicial and formal decisions by tribunals of every kind ; of legislative matters entering into the composition of laws ; and, finally, of sundry special matters constituting the substance of law, as of predicaments and their consequents, of consequents and their predicaments, of purposes, and the means of realizing them ; of the above matters in all the indexes as they are in English, Scotch, Irish, imperial, colonial, and foreign institutions and laws, with their cognates and correlates as found in one another, so that the assimilator may be enabled at once to embrace with apt designations and distinctions the corresponding matters in other laws of other parts of the same empire, relating to the same subject-matter in like predicament ; and, last of all, the index concordance of phrases not falling expressly under the above heads.

The cross references which must exist in any system of law, will here find their place in a form to mark the true relation of the matters to which they belong, and to shew where all things are, and that none are unprovided for.

For greater distinctness, it is proposed that the collective histories, states, personal rolls, terriers, charges, and countercharges, calendars, of times and events, code of instructions, register of claims and transactions, indexes and concordances, with a commentary closing up the whole, and constituting, like the introductory part, the means of marking the connection of matters somewhat scattered and disconnected, should make up ten distinct parts or subdivisions of the last or fourteenth part, in order that they may be exhibited with appropriate fulness and detail.

Now, this is the end and aim of a body of law, intelligible and accessible to the people, characterised by unity in the whole and in each part, by comprehensiveness, by propriety, by uniformity, and by completeness :—full, minute, accurate, omitting nothing, answering to the claims of the severest lawyer and pedant, meeting the wants of the least intelligent so far as they can be met :

like a globe, exhibiting the whole and all the parts in due relation; and, indirectly, by the occasional use of it for special teaching, its general scope and nature, and its proper use.

From the sovereign to the meanest officer, from the highest to the meanest subject, to the busiest and idlest alike, to the most superficial and to the most profound, affording all that register and code can afford; not giving the law in a single phase, but in all phases; not narrowed to a dry arbitrary procrustean method, but welcoming and including all methods; not the work of a single presumptuous, conceited pretender, presuming single-handed, and by a few untrained, inexperienced assistants, to embrace an effort that demands a nation's energies and a nation's resources; but the work of all, directly or by representation, of every one living or dead, who has contributed suggestions to the task, of all functionaries throughout the realm, especially of the judiciary order, and the heads of departments; of all persons willing to take part in the work, of all students and candidates for places of trust and discretion; requiring, as all such places do, a knowledge of the institutions and laws of the country.

And these not working hap-hazardly without instruction, without communication, without subordination to a common purpose, but with allotted duty, forming a specific part of the great work, and, by aggregation of the several parts worked out in an uniform manner, and brought together according to design, presenting, as it were suddenly, in the result, a coherent, entire, completed whole,

"Totus, teres, atque rotundus."

This result is to be accomplished by the careful preparation of moulds or models for the workman, suitable for every part of the work—for the collection, ascertainment, declaration, promulgation, conservation, administration, and assistance in every department, both of principle and detail, whether legal, official, literary, constitutional, parliamentary, mechanical, social, or other; so that not only may the result be brought out with the desired completeness, but every part may be vouched by any objector whomsoever, and the risk of the misunderstanding and abuse of the code, as of every other written law, may be obviated by an appeal to the very sources of it; for no human power can prevent the human mind from collating the new thing that is presented to it with the old

one that has preoccupied it, and by all the force of prejudice resisting the new till the old be indisputably rejected by competent authority. It is for this reason necessary that the distinguished persons advanced in life who are the depositaries of judicial interpretation, should have taken part in the previous ascertainment of the state of the law, and in the previous recognition of the defects imputed to it, and in the determination of the purposes which the reduction of the law into a code is to accomplish.

Doubtless, the drudgery of making the necessary statements, and the duty of arguing after the manner of counsel, should be performed for their ease and convenience by younger energies and less occupied minds, and their especial functions be confined to the exercise of the judicial faculties to which they are inured.

This and the connected operations belongs, however, to another part of the subject. We will now proceed to consider the details of the moulds or models and their specific uses; and, if we appear to descend too minutely into detail, we must beg the reader to recollect that it is done for his ease and use. Few men have considered the subject with more particularity than that which they have found necessary for some immediate purpose; hence, some of the most common considerations are for the most part, and to all practical purposes, *recondite*.

By bringing them out to view on the surface, we hope to make them more commonplace, and, after a few essays, the recognised method of exhibiting law, throughout the several stages of its progress, *ab ovo ad finem*.

If we look at a railway, or at any other such enterprise, when it is novel, and we are not familiar with its final use and the purposes of its parts, we see many things that seem to have neither beginning, middle, or end, and to have no relation to the common purpose; but the moment the parts are put together and in gear, and the train is placed on it, the meaning of the whole becomes apparent, and the contributions of the several parts are lost sight of in the contemplation of it. It is thus with this subject: many details, highly necessary both for efficiency and economy, in which we include the orderly working of the work, the discipline of the workers, the distribution of the work according to its nature amongst the workers according to their skill, the trial of the work

in its different stages, the vouching of the work before sanction, the facility for the introduction of alterations and amendments either during the period of its passing or in subsequent sessions, the convenience of the different orders of persons who are to use the work when it becomes law, either as private persons, subjects, or others, or public persons, the sovereign, the parliament, the tribunals and officials of every order, and the facility of registering the action thereon, are undervalued and may be misrepresented ; and because, perchance, they do not allow an ignorant person, *per saltum*, without regard to consequences, to make a law affecting the persons, the property, the commercial transactions, the professional transactions, and the exigencies of the suitor in any manner he pleases, in despite of parliament itself and its prerogatives (the law being the law of parliament and not the law of any individual maker), think fit to scout the idea that their independence is to be fettered by the rules of logic, the rules of grammar, the rules of good sense, and the rules of convenience, and rise in indignant remonstrance.

It is to obviate such consequences, to strengthen the hands of the wise, the patriotic, the accurate and masterly legislator, that it is proposed, by the collection of all past examples, and by the reference to certain well-ascertained considerations, to found a series of moulds or models, that shall give to the artificer of the code the means of building up his fabric in symmetrical proportions, and of maintaining its consistency in subsequent changes.

The first step is obviously to marshal all existing persons and institutions, and to ascertain the existing law ; and, in so doing, to ascertain all those matters which go to make up a person, an institution, a law, and to determine the relations which they have to each other.

It is proposed to do this partly by registration, and partly by statutory enactment. By registration as to all those matters which have their existence from natural or conventional causes ; by statutory enactment as to all those matters which have their existence by force of parliamentary authority, other than mere recognition ; and again by registration as to all those matters of a mixed nature, natural, conventional, legal, which are the effect of

recognition and incidental sanction ; and, finally, as to all those matters which are exceptional, being departures from normal states, and yet veritable existences, such as we must take note of, the libeller, the outlaw, the criminal, &c. &c. &c.

As the substance of all law is reality, we must deal with the realities before the words which represent them, and this may be well done by indexes, chronologies, states, rolls, calendars, and other such abstract methods of registration.

In considering the written form, we must bear in mind the two methods proposed, that of registration, and that of statutory enactment, and the language appropriate to each. The former simply narrates and describes what is or has been, the latter superadds the language of authority, enactive or declaratory. With this difference the two instruments, the Register and Statute correspond.

The person or personal entity, which is the subject of the institution or law, is the common element of both, about which all other incidents are to be arranged in due order.

This entity may be single or aggregate ; it may be individual, fellow, member, commoner, successor, or substitute ; it may be pure and simple, special, general, plenipotentiary, and limited ; it may be sovereign, supreme, superior, special, subsidiary, subordinate ; it may be administrator or assistant, magistrate or subject.

It has always these incidents (which are either special, special general, transitory, explanatory, detailed), a purpose, an authority by which existent, a body of qualifications, a tenure of existence, a jurisdiction over persons, over subject-matters, over places, over times and events, over modes, and is subject to some universal, common, general, special, and sometimes individual institutions and laws. It has certain correlate interests, rights, obligations, powers, special duties, special authorities, ranges of action, prescribed acts of registration, special protections, special responsibilities, special benefits, indemnities, or remuneration.

Let these matters be placed in parallel under the heads of the respective personages that stand in the nearest common relation ; that is to say, in the order of the proposed state register from beginning to end. Give one or more complete personages to each

workman, and at the same time give to different workmen a separate class of considerations; that is to say, to one all the purposes affecting all personages, to another all authorities by which persons are existent, to another all the qualifications, to another all the jurisdictions of whatever kind, to another all the jurisdictions over persons, to another all the jurisdictions over any given class of subject-matter, to another all the jurisdictions over another given class of subject-matter, and so on, to another all the jurisdictions over places, to another all the jurisdictions over times, to another all the jurisdictions over modes, to another all subjections to universal law, to another all subjections to common, to another all subjections to general law, to another all subjections to special law, to another all subjections to individual law, and so on throughout all the matters had in common by the different personages, each agent taking the whole of a single matter in relation to all the personages.

Thus each worker will learn the entire considerations of some one or more personages, and all of some one or more considerations applicable to all personages.

In the first stage of his career of workman he should be simply a collector; collecting by the help of those charged with the performance of Part II., or chronological register of acts of state, &c., all the matters assigned to his cognizance.

To facilitate this operation, it would be well to divide the whole of Part II. of the register among all the workers, giving to each workman a part of each period, and requiring not only that the statutes should be recorded in lists, but that they should be read: that is, articulated, indexed, extracted, inserted in proper places, abstracted, compiled, collected, annotated, deposited in library, and communicated to the persons concerned.

The result of this operation would be a history of each matter arranged chronologically. It would be for the worker to mark the epochs of his subject, the changes which had taken place therein, the fluctuations of change, the intervals of change, the things inserted and the things dropped, and the respective action and influences of the Acts of State, the Acts of Parliament, the Acts of Courts of Justices, the Acts of Office, and the Acts of the People, and public opinion, including therein the action and influence of the press.

Now this work looks appalling, but by appropriate mechanical appliances it may be lessened to a degree inconceivable to those who have not meditated on these things, and the means by which they are to be accomplished.

Let us prepare (we are not speaking of an ideal, but of an actual expedient, of which we have the model)—let us prepare a register, arranged according to the state register or code.

Let this registry consist of a series of cases of uniform size, ranged on shelves after the manner of a library, with the nature of its destined contents marked on the six or seven panels of each case, so that the passer-by may discern the place, position, and relation of each matter.

Let each of these cases be prepared with a list outside for the insertion chronologically of the matters as they are collected, and with an index of the contents of such matters, and also with a suitable abstract outline of the matters assigned to the case.

As the matters come to hand, let them be dealt with in appropriate fashion, that is, placed in due order according to the abstract, entered in the serial chronological list and in the index; and let such matters as are not appropriate be eliminated, and all matters of concordance and discordance, of completeness or incompleteness, annotated.

Before a stroke of work is done, the whole scope and scheme of the registers or statutes may be exhibited to the eye, and placed under the care of a register keeper, to report thereon in suitable manner every piece of contribution as it comes to hand; so that day by day the officer charged with the superior work of recordation, may have accessible and fit for use whatever appertains to each head of the matter.

This physical embodiment and explanation, in extended form, will make the matter intelligible at one view to every body. Tables are too brief; elaborate compilations too extended; but these should be at hand for the service of such as may desire, on the one hand, a more concentrated expression of the matter, or, on the other, a more ample expression.

The working stationer, printer, bookbinder, printer and engraver, would do the work of a hundred intellectual persons,

under the guidance of a small body of such persons, duly organized ; and in the course of a few months, with the help of one or two collateral operations, we should have before us a rough collection of the whole body of the matter of the law, with practical aids for every order of workmen, from the mere sorter to the minister and member of parliament.

These materials exist—Nicholas Bacon, Lord Bacon, Bentham, Brougham, Bethell, Cockburn, Locke, Hargreaves, Bellenden Ker, Brickdale, Coode, Dwarris, Gael, Empson, Rickards, Booth, Symonds, and a host of persons, have furnished material in rich abundance, but it is scattered and unconnected.

Let this matter be put in order in a register appropriated to the subject, after the fashion we have indicated, and of which we have before us a practical example, and the whole of it will be as accessible as goods in a mercer's shop. We beg pardon of those high enlightened folks who disdain to imitate their Creator, by adopting, for the highest intellectual results, the most mechanical means and details that are available to them.

Thus far as to the general outline or sketch of the State Register or Victoria Code ; of the scheme of its individual Parts, of the methods that are available for reducing the chaos of our materials into order, for the bringing into the service every description of practical power that God has given us for the undertaking—intellectual, literary, mechanical, special, legal, official, constitutional, parliamentary, and social.

We propose now to indicate in very detail the items of consideration which are to be regarded in the different instruments of legislation, both in their inchoate and in their perfect state, without which it is in vain to hope to establish an uniform method of legislation ; or either a government revision of current legislation, or a parliamentary revision of current legislation, or, what is more to the purpose, both combined.

There must be a base of operations for the common use of all the workers employed on the work ; and of their critics and judges, and of their masters, the Legislature. And that must consist of either one or more, or all of the following methods :—

1. A Body of Collected Examples.
2. A Body of Authoritative Doctrine.
3. A Body of Prescribed Precedents.
4. A Body of Standing Orders.
5. A Body of Resolutions of both Houses.
6. A Body of Enactments.

The prudent step would be, in the course of collecting the statutes under every head or subject, to pick out all examples of whatever kind of phraseology, all precedents of clauses for different purposes, and, in the fashion we have indicated, to file them together, and, by the help of chronological lists and indexes, to make the matter of which they consist accessible.

The selection of these forms will not be useless even as regards the matters which are to be extracted for the other purposes of collation. On the contrary, they will assist that work, and serve to force a more intimate examination of the contents of each act and statute.

In the same way we should recommend, that in reading every statute, certainly every body of statutes, the collector should be directed to insert in the standard order the matters of which it consists—

- In the Heading.
- In the Title.
- In the Abstract.
- In the Preambles.
- In the Special Provisions.
- In the Special General Provisions.
- In the Transitory Provisions.
- In the Explanatory Provisions.
- In the Supplementary Provisions or Appendixes.
- In the Index.

By this process, the work of consolidation, in its secondary stage of assimilating the law, will be accomplished, as by the chronological and historical method its primary stage of ascertaining it had been accomplished.

The details then are :—

Instruments of Preparatory Legislation.

- The Legislative Report.
- The Legislative Bill.
- The Abstracts.
- The Resolutions and Instructions.

Instruments of Legislation Complete.

Universal Code, Statute or General Law.
Common Law Code, or Statute.
General Law Code, or Statute.
Special Law Code, or Statute.
Individual Code, or Statute.

Headings of the Instruments of Legislation and parts thereof—**Structure of the Heading.**

Enumeration of Headings.
Structure in Common.
Structure Peculiar.
Defects.

Matter of the Heading.

Enumeration of Matters.
Matter in Common.
Matter Peculiar.
Defects.

Order of the Heading.

Enumeration of Orders.
Order in Common.
Order Peculiar.
Defects.

Verbal Expression of the Heading.

Enumeration of Verbal Expressions.
Verbal Expression in Common.
Verbal Expression Peculiar.
Defects.

Typographical Expression.

Enumeration of Typographical Expressions.
Typographical Expression in Common.
Typographical Expression Peculiar.
Defects.

Abstracts of Legislative Instruments :—

Enumeration of Abstracts.
Structures of Abstracts.
Enumeration of Structures.
Structure in Common.
Structure Peculiar.
Defects.

Matter of the Structure.

Enumeration of Matters.
Matter in Common.
Matter Peculiar
Defects.

Order of Matters of Abstract.

Enumeration of Orders.
Order in Common.
Order Peculiar.
Defects.

Verbal Expression of Abstracts.

Enumeration of Verbal Expressions.
Verbal Expression in Common.
Verbal Expression Peculiar.
Defects.

Typographical Expression of Abstracts.

Enumeration of Typographical Expressions.
Typographical Expression in Common.
Typographical Expression Peculiar.
Defects.

Marginal Notes of Instruments of Legislation :—

(Pursue the Analysis through this and the succeeding Headings as above, that is to say, with the Divisions, into—

Structure.
Matter.
Order of Matter.
Verbal Expression.
Typographical Expression.

With their Subdivisions into—

Enumerations.
Matters in Common.
Matters Peculiar.
Defects.

Taking care to omit none ; for the purpose is to have a place ready for the insertion of any matters of the sort which come to hand in the collection, ascertainment, and other purposes.)

Titles of the Instruments of Legislation :—

Full.
Abridged.
Short.

Preambles of the Instruments of Legislation :—

Statements of Institution and Law.

Statements of Grievance.

Statement of Expedients in use here or elsewhere, now or here before.

Statement of Expedients available.

Statement of Purposes.

Expressions of Enactment :—

In Constitutional Acts.

In Money Bills.

In Ordinary Statutes.

Parts of Legislative Instruments :—

Parts of a Code.

Parts of a Consolidated Body of Law.

Parts of a General Law.

Parts of a Special Law.

Parts of an Individual Law.

Divisions of the Legislative Instruments :—

First Division—Special Provisions.

Second Division—Special General Provisions.

Third Division—Transitory Provisions.

Fourth Division—Explanatory Provisions.

Fifth Division—Supplementary Provisions.

Chapters of the Legislative Instruments.

Enumeration of Chapters.

Sections of the Legislative Instruments.

Enumeration of Sections.

Clauses of the Legislative Instruments.

Enumeration of Clauses.

Paragraphs of the Legislative Instruments.

Enumeration of Paragraphs.

Phrases of a Legislative Instrument.

Enumeration of Phrases.

Words of a Legislative Instrument.

Words importing Persons.

Words importing Places.

Words importing, &c. &c.

Schedules of Legislative Instruments :—

Lists.

Calendars.

Rolls.

Instructions.

Terriers.

Forms.

Tables.

&c. &c. &c.

The above, with the addition to each item of the ordinary items of analysis, structure, matter, order of matter, verbal expression, and typographical expression, together with the items of inferior analysis; viz., matter in common, matter peculiar, and matter of defect—constitute a complete analysis of the structural parts of legislative instruments, and give the means of collating, in unconfused order, all the expedients now or hitherto in use, selecting such as should be most appropriate for distinctive characteristic expression and convenience.

They also indicate, to a great extent, the analysis of the substance of the matters, and the manner of compilation; but there are other analyses suitable to the substance of matters—say of rights we have interests—rights—obligations—powers—duties—authorities—action—registration—protection—responsibilities—and remuneration, which comprise all the elements of rights.

Of status we have, as above stated, purpose, subject, authority, creating or recognizing, the act of creation or recognition, the object of creation or recognition, the jurisdiction, &c.

Of tribunals we have head, members, assistants, officers, agents of suitors, clerks, assistants mechanical and menial.

Of procedures we have the stages initiatory, &c.

Of pleadings we have *statements*, &c.

Of forms, we have parts and places, and so of each instrument and matter of an instrument there is an appropriate analysis to be expressed by the abstract, and to constitute the skeleton of the compilation; and this analysis is to be found, as in all cases of science, by a careful collection and comparison of all methods of statement, of such sorts which have been used; and, as in all cases of art, to be subjected to the rules of convenience, which the action of life in its various predicaments of abounding claims, and limited assistance, of scanty information and restricted means of inquiry, of controversy and restricted authority, of financial necessities and of limited official assistance, is forced to submit itself; but which, by the growth of experience, and the occurrence of opportunity, it eventually masters.

We do not affect to give these abstracts. The object is simply to indicate the nature of the thing, and the necessity of employing them as the framework of the legislative instrument about which

is to be placed, in due form and order, the expressions of the matters which constitute the subject of legislation in the given case.

No masterly work in the way of legislation can be effected without such method.

To do justice to this subject, the *Mechanics of Legislation*, with regard to these details contributory to the structure and expression of the law, by way of illustration and explanation, would fill not an article in the *Law Magazine*, but a goodly volume; and we reluctantly touch upon the subject in this imperfect manner, but every day's experience teaches us the necessity of bringing one another to the consideration of the mechanical or structural elements.

We have had full enough of aspiration; we want now to know the very ways and means by which the labourer is to execute the architect's design.

This is our task now. What has been done hitherto we must in all charity suppose to have been done from the very necessity of the case; but our effort is, by raising a new platform whereon Archimedes may fix his instrument, to take a fair start, and to make our means of legislation conformable with and efficient for their purpose.

We have in this article touched on the whole machinery of an instrument of legislation. In our article of the last number, entitled "*Legislative Predicaments and Processes*," we indicated these predicaments and processes, and showed the different stages, from the very reception of a legislative act to its final and complete destination as an authoritative rule of conduct to the people, brought home to them by means of suitable promulgation.

The official and other means, now in our possession, paid by the State at a large expense of public treasure, has been indicated in the paper relating to the legislative arrangements of the ministry of justice, showing how all hands may be invoked to the work, and their respective contributions of assistance rendered light by appropriate distribution, may be brought into use at short and convenient periods, so as not only to make the law what it ought to be at starting, but to maintain it in its unimpaired integrity as a

body of law, embodying year by year the fresh accretions of legislation by statute and of definition by decision into one record, and to that end, so framing every instrument of legislation that it may receive fresh matter without dislocation of its fabric, and without diminution of substance, or be itself, with like results, imported into other instruments of legislation. To that paper, which will probably be printed in the forthcoming "Transactions" of the National Association for the Promotion of Social Science, we must refer for the explanation of the personal agencies.

It is obvious that details so vast and various, cannot be indicated in an article of a publication like the present, nor can they well be illustrated without an ample use of the authorities who have for three hundred years contributed, in some one direction or other, all probably that is necessary for use.

We do not refer only to the codes of Justinian, Napoleon, or America, or elsewhere, all of which should be printed in outline, in broad sheet, and exhibited to the eye for the sake of readier comparison; but the partial efforts of different labourers who have laboured to combat with partial evils, and who have by the united aid conquered the whole mass.

There is no want of force; our profession is some thousand strong, in men willing and able to take part in the work—men who are to be our future judges, statesmen, legislators, administrators, public writers, and men of business of every sort.

A task which should familiarize them with the scope of the whole law, and make a lawyer no longer a mere artisan, acquainted only with a corner of his subject, would be welcomed as a boon, and not less so if it were accompanied with a moderate honorarium to sweeten the labour.

- We little thought five years ago, when we presumed to submit to a high legal functionary a plan for accomplishing the work by due stages, first, of preparation, second, of collection, third, of determination of questions, fourthly, of compilation of material, fifthly, of sanction and adoption of the work—that the period of five years would elapse, and that we should not have even reached the threshold of the subject—that five years of valuable time, that fifteen thousand pounds of treasure should be expended,

and that the very first conception of the work as a whole is to be accomplished.

Little thought we that the great men of England would have evaded their task, and thrown on parliament the solution of difficulties which it was their own proper vocation to accomplish. But what could be expected from a course of policy that systematically excluded from the service almost every person who had devoted himself to the task, that made a personal matter of a question of national import? We will not dwell upon the painful topic. It is idle to talk of reform of parliament, or of a ministry of justice, or of other reforms, all equally necessary and important, but which must prove, comparatively speaking, failures, unless they are preceded, or attended, or immediately followed by the collection and consolidation of the materials of information and law whereon their operations must depend.

Indeed the perpetual creation of partial institutions, and the enactment of partial laws, are at once the parent of the present state of things, and the cause of the perpetuation of the difficulty ; while the statement, in well-digested and well-connected order, of the institutions and laws that we have, would show how much excellence they contain, now covered with rubbish, and thereby rendered useless ; how many excellent principles and systems that require development, some incongruities to be expurgated, but the whole, in its foundations and essence, of so masterly a nature, that they would, with the free action of public opinion, and the generous spirit that prevails throughout all ranks and conditions of men in this country, work themselves into the noblest body of institutions and laws that ever existed.

But so little do men conceive of this work, that they hold the door close, and with the candle behind, as if one were entering a house of ill fame.

Let us open the doors, and let every well-wisher walk in and see what is doing : let us go into the office and see there working, it may be with sedulous activity, the grave and thoughtful students, and in the neighbouring workshop and see there the laborious assistant employing all available appliance to realize in the readiest manner the work committed to his care, acting in immediate connection with, and in intelligent subservience, to the literary

workman who directs him: let us go into the council and see there the grave and venerable commissioners sitting in due form and order, disposing of every matter with suitable gravity, receiving the applications of their assistant commissioners for instructions on their doubts and difficulties, and, among themselves, bestowing on their imperial work the results of their jurisprudential experience and wisdom: let us pass into the committee-rooms where special matters are more intimately dealt with, and where the results are vouched with painstaking accuracy.

Doubtless all this creditable industry and conduct has been going forward in the Commission, is recorded in minutes admirable for their explicit fulness and business-like precision, and the results of the collection of material is shewn in well-arranged and well-ordered shelves of the Commission, and future ages, in referring to the accumulated stores of practical legislative example, will attest the greatness of the spirit that animated every portion of the labours of the Commission, its richness of resource, its self-denying labours, its energy and ability to direct and command; in short, the consummate excellence that a great State would bring together for the production of a work calculated to illustrate the period, and to be for all time the palladium of all classes and conditions of the peoples throughout the wide extent of its dominions.

We must close our commentary on this occasion, by expressing a hope, that before any further futile and empirical attempts in this direction are made, the principles of the work, both in its leading purposes and in its details, will be settled. To refer such a matter to a select committee of the House of Commons without such a basis of operation, is to repeat the abortive efforts of 1836 and 1857, to mock all fair expectation. When a matter is committed to a committee, it should be with a definite purpose, upon definite principles, to ascertain—to execute—to sanction—to do a limited definite act within the scope of its capabilities, of its information, and its opportunities.

We shall have another opportunity before parliament meets again, or can enter on this matter, to discuss this part of the subject; we mean the ripeness of the subject for treatment by parliament, whether collectively by the whole house, or by a select committee; and if not, the trustworthiness of the Statute

Law Commission, as at present constituted, to receive from parliament the high, scarcely constitutional, delegation to deal with the subject without a more explicit declaration of purposes, means, methods, plans of operation, and tests for the verification of the work. This matter has been postponed, but cannot be evaded eventually. In short, it is the means by which parliament can be made master of the subject, to the extent of knowing what it delegates, and wherefore; its means of exacting fair action, and fair responsibility in the part of the Statute Law Commission. That body, in the language of an unjust steward, suggests to parliament that it knows nothing about the matter, and that it should trust entirely to it, without deigning the explanation which would shew it to be trustworthy. Parliament is intelligent enough, and could understand proper explanations properly made, but its function is neither research nor detail, and it has confided to the Statute Law Commission that research and that detail; but the Statute Law Commission in its special mission fails, and tells Parliament to do that sort of work for itself.

ART. VI.—*Commentaries on the Criminal Law.* By JOHN PRENTISS BISHOP. Vol. I. Boston (U. S.): LITTLE, BROWN, & Co.

TIS true, albeit strange, that in this country—we speak now solely with reference to that part of the United Kingdom called England—no such work as a philosophical treatise upon Criminal Law in fact exists. Mr. Jervis's well-known volume, of which several issues have been ably edited by Mr. Welsby, was designed as a hand-book for the practitioner. Mr. Boothby's synopsis was meant for use in Court—obviously not for private reading; and Sir William Russell's elaborate and somewhat ponderous volumes, though of unquestioned authority and value, scarcely fulfil our conception of what a scientific treatise should be, and, owing to recent and still projected changes, are unfortunately obsolete.

We notice then, with considerable pleasure, the appearance

of Commentaries on the American Law of Crimes, which profess to be philosophical, and, so far as we have examined them, deserve to be esteemed so.

It has oftentimes struck us as singular, that in a country so far advanced in civilization as our own, little or nothing is really known by the community at large as to the laws which govern them. The study of law has been in this country, we grieve to say it, systematically neglected, even amongst the middle and the higher classes; and although much is at this time being effected, as well by the Universities as by the Inns of Court, to remove the stigma which has been affixed to us as a nation, of being lamentably ignorant of jurisprudence, much has yet to be done in a like direction. We believe the accusation which has thus been made against us to be indeed substantially well-founded, and think that a comparison of our law-writers with those of the United States would result in favour of the latter. Our transatlantic brethren of the bar write as jurists, whereas with us the fashion is too much to write as compilers and makers of text-books. One cause of our deficiency as legal writers indubitably is, that law-books are not in general read with us, as they seem to be with our transmarine neighbours, beyond the pale of the profession. That Mr. Bishop, at all events, anticipates for his lucubrations a most extensive circle of readers, is manifest from certain paragraphs in his preface. "The uses," he remarks, "to which I consider this particular volume adapted, are the following:—

"First, To do, as far as it goes, the ordinary service of a treatise for judges and practitioners in the Criminal Courts.

"Secondly, To be read and consulted by lawyers whose duties are in the Civil Courts, and who need, as all do, to have some acquaintance with the Criminal Law.

"Thirdly, To be read by law students.

"Fourthly, To be read by that numerous class of non-professional gentlemen who serve as magistrates.

Fifthly, To be read by non-professional statesmen and legislators, who all need a general acquaintance with the nature of the Common Law, and the rules which determine the interpretation of statutes.

"Sixthly, To be read by others who may wish to discipline and reform their minds, by such an acquaintance as it will give them, with our noble Common Law."

We trust that Mr. Bishop's anticipations of a wide circle of readers for his book have ere now been realized, for we have formed, after no slight examination, a favourable opinion of it. Sure we are, at all events, that he is a really conscientious writer, and equally sure we are that he is quite sufficiently self-reliant, and not likely very readily to be led astray by erroneous *dicta* or fallacious reasoning. "Much of my labour," he tells us (Pref. p. vi.), "has necessarily consisted in bringing to the test of the law itself, as adjudicated, the principles and reasons which have been proposed by others, and rejecting such as were thus seen to be unsound. And no one who has not had occasion to examine in this way an extensive title in the law, can appreciate how full our books are of loose and inaccurate propositions;" and, in the ensuing page of his introductory observations, he adds, "I have not commonly set down the law in the words either of judges or of former authors. In the few instances in which I have employed the words of others, I have used marks of quotation, and given the necessary credit. I know well that some readers will consider this feature a blemish. If I could have thought so, and could have consequently entertained all the views of my duty which such an opinion implies, I should have saved more than half the labour which this work has cost me. As I understand the matter, the law which judges decide lies where human speech never went; it is not words, though words may imperfectly describe it. But the man who as judge decides the law, cannot tell what it is better than another person. If a judge, in delivering a judicial opinion, announces a legal principle, his words are not that principle, neither does the Court decide the principle; even if it should profess to, it could not—it can only decide the case. For a principle never was, and in the nature of things never can be, a matter of absolute adjudication. A doctrine, therefore, which a judge may lay down, has not, even in point of authority, any positive advantage over one proposed by another person; but when enunciated in the course of a judicial opinion it has this disadvantage, that it

is spoken in reference to the facts of the particular case; and so, though true in its connection, it may not be true when transferred into a legal treatise."

The above extract alone might wellnigh suffice to show that Mr. Bishop is determined in an independent spirit to search after legal truth, and in thus pursuing it is actuated by a sincere and earnest desire "to benefit alike the profession and the public," (Pref. p. xiii.) It is in this independent and truth-loving spirit that law treatises should ever be compiled, and we regret to believe that it more prevails on the other than on our own side of the Atlantic.

We collect from the preface to this volume (which alone we have received), that it is meant to perform the office of "a full treatise" on Criminal Law, and that the second volume, completing the entire work, will concern itself with practice merely. We feel justified, accordingly, deviating thus far from our customary plan, in noticing this volume separately, as if it were an independent treatise. It is, in fact, an elaborate and philosophical essay upon Criminal Law as existing in the United States, and contains, moreover, disquisitions upon various subjects akin to, though not directly bearing on, the main design, which are of much interest and utility to the reader. Our author in Book I, for example, discusses, *inter alia*, "the origin and nature of all Law," the "different divisions of Law," the "authority of the Common Law in the several States of the Union," and Criminal Law as administered by Courts, Ecclesiastical or Martial. In Book II. he specifies the rules of "legal interpretation," applicable to the construction of statutes, as well as the meaning of particular words and phrases which occur in them. And it is not until some two hundred or more sections of the work have been accomplished, that our author begins to examine the nature of "criminal intent," an accurate conception of which is, of course, essential to the due understanding of the Law of Crimes. This interesting topic is fully and ably treated in the work before us. "Criminal Law," says Mr. Bishop, "relates only to crime. All crime exists primarily in the mind. Neither in philosophical speculation, nor in religious or moral sentiment, would any people in any age allow that a man should be deemed guilty unless his mind were

so. It is therefore a principle of our legal system, as probably of every other, that the essence of an offence is the wrongful intent, without which it cannot exist. We find this doctrine laid down not only in the adjudged cases, but in various ancient maxims, such as *actus non facit rerum nisi mens sit rea*, the act itself does not make a man guilty, unless his intention were so; *actus me invito factus non est meus actus*, an act done by me against my will, is not my act, and the like. In this particular criminal jurisprudence differs from civil," (sect. 227.) "It is, therefore, a universal doctrine, that to constitute what the law deems a crime, there must concur both an evil act and an evil intent, though as to the act it is often sufficient if it be evil only in consequence of the intent with which it was done."

Having thus stated the fundamental principle of law as to intent, Mr. Bishop proceeds to shew that from carelessness, recklessness, or neglect in the discharge of a legal duty, a criminal intent may in a great variety of cases be inferred. "The bare neglect of a legal duty," he says, "as of the owner of a river to scour it, whereby the neighbouring lands are overflowed, may render the party indictable for a nuisance. In like manner, an officer of the law who keeps a prisoner committed to his custody so negligently that the prisoner escapes, must answer for this neglect as a crime. And on the same principle a man is sometimes held criminally [responsible] for the act of his servant; or rather, for his own act in respect of such servant; for as Bayley, J., once observed—'If a person employ a servant to use alum or any other ingredient, the unrestrained use of which is noxious, and do not restrain him in the use of it, such person is answerable if the servant use it to excess, because he did not apply the proper precaution against its misuse.' Nevertheless, adds the learned writer (sect. 235), "the law does not notice small things. This, indeed, is a branch of the doctrine already discussed, that judicial tribunals do not take cognisance of all wrongs. Of course, it follows from this maxim, that there may be a degree of carelessness so inconsiderable that the law will not make any account of it as criminal. We may not find it easy upon principle to show the distinction between the less and greater degrees; and when we seek for it in authority, the line there appears angular,

variable, and uncertain. Thus not every degree of carelessness in a medical man will, if death follow, render him liable for manslaughter, but it must be gross; or, as more strongly expressed, the grossest ignorance or most criminal inattention."

The entire subject of "criminal intention" is doubtless one of much difficulty and importance. We have never met with a better discussion of it than in the present treatise. It is, in truth, well analysed by Mr. Bishop, and we think well-nigh exhausted, reference being perpetually made to first principles almost from the first to the last of his pages.

For instance—"Ignorance of *fact*," remarks our author, "stands in both civil and criminal jurisprudence upon an entirely different ground from ignorance of *law*. Here the rule is *ignorantia facti excusat*. Ignorance, or mistake in point of fact, is therefore, in the language of Gould, J., 'in all cases of supposed offence a sufficient excuse.' In questions, however, of private right between individuals, the rule is not universal. 'For in this case,' as observed by the same authority, 'the end proposed by the law is not the *punishment* of an offender, but the mere reparation of a private loss or injury to which the plaintiff has been subjected by the act of the defendant, and it is deemed just and reasonable, independently of any question of interest, that he by whose act a civil injury has been occasioned, should ultimately sustain the loss which has accrued rather than another," (Sect. 241.) And again—"The law presumes that every person intends to do what he does, and intends the natural necessary and even probable consequences of his act. Of course the presumption of an intent to do the act, is always open to be rebutted by evidence; but when this intent is established, the deduction that the consequences were also intended, is generally, not always, conclusive. It does not appear clearly what the rule of distinction here is; probably the conclusive character will attach to this deduction, in most cases where the act done is unlawful, and the consequence is not too remote or contingent. One, for example, who intentionally utters a forged instrument, is conclusively presumed to intend a fraud upon the person whose name is forged, and a similar principle applies when an unlawful act is wilfully done which produces death. Still it would seem to

be going too far to say, that in all cases of an unlawful act intentionally done, the presumption as to the consequences is conclusive; and indeed it is probably impossible to lay down the exact rule in the present state of the authorities."

The extracts above given, being taken almost at random, might suffice to shew that Mr. Bishop treats his subject conscientiously and in a philosophical spirit; and, although we might not always agree in his conclusions, our impression on looking through this volume is very strong that he is a painstaking and truth-loving writer, and we can affirm that in style he is vastly superior to the great majority of writers of law-books in this country. In proof of what we say, we may add to passages already extracted the following. The author is speaking of necessity and compulsion, and inquiring whether they afford excuse for crime—"It is very familiar learning," he says, "that if a man is attacked by a ruffian, and has no way of saving his own life but to kill the assailant, he may lawfully do so. Yet a distinction is taken between this and killing an innocent third person. 'According to Lord Hale,' says Russell (Ed. by Greaves, vol. i. p. 664), 'a man cannot ever excuse the killing of another who is innocent under a threat, however urgent, of losing his own life' if he do not comply: so that, if one man should assault another so fiercely as to endanger his life in order to compel him to kill a third person, this would give no legal excuse for his compliance. But upon this it has been observed, that if the commission of treason may be extenuated by the fear of present death, and while the party is under actual compulsion, there seems to be no reason why homicide may not also be mitigated upon the like consideration of human infirmity; though, in case the party might have recourse to the law for his protection from the threats used against him, his fears will certainly furnish no excuse for committing the murder. Still, in a late English case, Lord Denman laid down the broad doctrine to the jury, 'That no man, from fear of consequences to himself, has a right to make himself a party to committing mischief on mankind.' So the text-writers say, that no one in extreme want of food or clothing may steal to relieve his present need. If, however, we accept the doctrine, that under any circumstances a man

to save his own life may take another's, clearly it follows that *a fortiori* he may take his property. But then no other means must remain of feeding the vital flame, which is a case entirely different from mere poverty, however extreme, and not likely to occur in fact." We confess that we scarcely appreciate the distinction here suggested by the learned writer.

The chapters in the treatise before us having reference respectively to the effect of Coverture—Infancy—Want of Mental Capacity—and Drunkenness in regard to criminal responsibility, may be specified as well worthy of perusal. Here we have the law bearing on the matters enumerated concisely stated, with extreme perspicuity and an ample citation of authorities.

Again, in speaking of the nature of an act recognised in law as criminal, we are told that "the thing done must be of sufficient magnitude, else the law which, as we have had occasion in several instances to see, does not notice small things, will take no account of it as criminal, '*De minimis non curat lex*—the law does not concern itself about trifles,' is an old and familiar maxim, which, standing in the foremost rank of legal maxims, exerts its influence through every department of our jurisprudence, civil and criminal. From the same root have sprung up around it other inferior maxims, one of which, very considerable in its influence, is, '*In jure non remota causa sed proxima spectatur*—in law the immediate and not the remote cause of any event is regarded.' It seems to have been supposed that this latter maxim does not prevail in the criminal law; yet an exact examination will show that it does, though, as with other maxims, attempts have been made to apply it where it is not applicable." (Sect. 320.) The remarks here extracted appear to us sound and useful; but we now merely offer them as a fair sample, taken almost at hap-hazard, of Mr. Bishop's valuable Commentaries. Such of our readers as will themselves consult his pages, will, we are assured, meet in them with very many other passages so lucidly expressed, as to convince them that this writer is no book-maker or compiler, but rather one who thinks for himself—has well digested his ideas, and is consequently quite able to propound them with aptness and with vigour.

When the volume which thus concerns itself with the princi-

ples of Criminal Law reaches—as we venture to prophesy that it will do—a second edition, let us, in concluding this notice, offer to its learned author two suggestions. 1st, That it should be published separately from, and wholly independent of that which is to occupy itself with the details of practice. 2ndly, That the diagrams should be omitted. To our apprehension the distinctions, such as they are, between treasons, felonies, misdemeanours, and wrongs, not indictable, do not become more manifest on studying the coloured “diagram of crime,” which is inserted at the commencement of Chap. XX. Nor do we find ourselves a whit more enlightened in regard to the mode in which one crime may be included within another, or several offences may be comprised within one greater and more heinous, after examining the devices which figure in the 26th chapter of this work. To us, indeed, it appears somewhat *puerile* thus to handle, and attempt to illustrate, a subject which in truth needs no such method of illustration for any save the densest capacities. And in a volume whose tone throughout is philosophical, and whose contents are well arranged, the flaw to which allusion is now made, seems the greater and more blameworthy. It may, however, very easily be excised.

Let us here take our leave of Mr. Bishop’s *Commentaries on Criminal Law*, which we would again commend heartily to the attention of English lawyers, and, let us add, of English law-writers, who would do well in their own treatises to imitate the excellencies of style and matter which throughout these pages are abundantly apparent. We wish this volume the measure of success which it certainly deserves.¹

¹ Since the above article was in type, we have received Mr. Bishop’s “*Commentaries on the Criminal Law*,” complete in two volumes, and rejoice to observe that the first of these volumes has already reached a second edition.—ED. L. M. and R.

ART. VI.—*Statements of all Legal Proceedings instituted by the Law-Officers or otherwise on behalf of the Crown, with respect to the Title of the Crown to the Bed or Shores of the Sea, or the Beds or Shores of Tidal Navigable Rivers, against Corporate Bodies or Private Individuals, from the year 1830 up to the present time.*

Of the Nature and Object of the Suit in each Case, &c.

Of the Length of Time during which each Suit was Pending, &c.

Of the Terms on which, &c., any such Proceedings have been settled, &c.

[Made up to July 17, 1857 ; ordered by the House of Commons to be printed, June 3, 1858.]

ENGLISH law may be said to be developed by fits. At one time one subject (in marked predominance over others) engages the attention of the courts; at another time, another subject. On looking into the earlier reports, subsequent to the Year-books, we find that cases of slander and libel were having the run of the courts, and constituted out of proportion the largest class of cases decided; later, and down to the present time, the same is true. In Lord Mansfield's time it is now Corporation Law, now Insurance, now Bills of Exchange, that each, at different periods, chiefly occupies the courts. Sometimes ejectment and other forms of trespass, with covenant and questions relating to land, are in the preponderance; sometimes questions arising out of commerce; sometimes matters of pleading and practice. A subject, after having been thus turned over, ventilated, winnowed, and sifted, milled, and rendered more or less fit for everyday use, will frequently, as it appears, cease to attract any further attention; the fashion of bringing before the tribunals controversies connected with it subsides; interest respecting it fades out, and for generations, perhaps, its name will hardly once be heard in Westminster Hall. Thus the subject of the crown's rights to the soil of the seashores, to the bed of the sea, and to the bed and soil of the shores of navigable rivers, after having scarcely been stirred—there are not half a dozen exceptions—since the date of the treatise *De Jure Maris* (which is commonly

attributed to Lord Hale), has of late years sprung into life again, has been much canvassed, and made wear a somewhat more compact and finished appearance than heretofore. For an insular people, it indicates very little of a tendency to litigiousness, very little tenacity of rights which Englishmen generally have been found to prize, that there should have been in our law, until the other day, no precise, and, if we may so speak, workable definition of the seashore.

By Justinian the seashore is thus defined, "*Est autem littus maris quatenus hybernus fluctus maximus excurrit.*" In the treatise *De Jure Maris*, it is said to be the land between the high and the low water-mark, and between those marks at ordinary tides—that is to say, between the ordinary flux and reflux of the sea; but Lord Hale, if he were the author, is not very positive on this point, and seems to have left it in doubt. One writer of acknowledged authority on such matters tells us, "*Costera maris* be words well known,¹ but their confined definition is hard to be found out; yet certainly they contain the shore and the banks, for by the statute 27 Eliz. cap. 24, an act was made for the mending of the bank and sea-work on the sea-coasts [in the county of Norfolk]; but in the 7th chapter of Maccabees, coasts have a larger extent, for there Demetrius, son of Seleucus, departed from Rome, and came to a city on the sea-coasts; and in Justin, treating of Alexander the Great, it is reported of him that he entered into Lycia and Pamphylia, and won and conquered all the sea-coasts. This (the author gravely proceeds) could be taken for no less than whole countries; for Alexander's great mind and huge army, could not march on a molehill or small tract of ground,"² &c. &c., and so on, in the way in which it was not uncommon with the old law-writers to maunder, when, from the state of the law, they had nothing specific to communicate in regard to the matter in hand. A late decision seems very materially to have improved the definition of foreshore, by adapting it better to practical purposes. However, under it the area of the shore seems to be narrowed not inconsiderably below what it has hitherto been

¹ Seashore, according to Johnson's *Dictionary*, means "the coast of the sea," which is pretty much *idem per idem*.

² Callis, *Sewers* 55.

understood to be ; for the line of high water-mark is not only depressed below that of the Roman law, but below that of the treatise *De Jure Maris*. In *A. G. v. Chambers*,¹ the rule laid down by two Common Law Judges, and adopted by the Lord Chancellor, was this :—The landward boundary of the seashore around England and Wales, is the *medium* line of high water of all tides occurring in the ordinary course of nature throughout the year.”² The soil below this mark, which is sometimes covered with water, and sometimes dry, is now settled to be, *primâ facie*, in the Crown ; the idea, once entertained, that it belonged to the adjacent manor, is no longer tenable. The rule is, that the Crown is proprietor of the *littus maris*, so defined as above, as the Crown is of the *fundus maris* ; but the former is not an absolute or inflexible rule, at least it may always be shown that the right to the *littus maris* has been granted to the lord of the adjacent manor ; there is no instance, we believe, of a grant of the *fundus maris* as such.

The proprietor of the adjacent soil has sometimes been said to be the only person to whom the foreshore can be granted out, and in America this seems to be the settled doctrine ; but here, as has been stated by high authority, “ it may belong to a subject, and to him in gross, which possibly may suppose a grant before time of memory.”³ A grant of the foreshore to the lord of the adjacent manor would not, it is obvious, make it part of the manorial territory ; the boundaries of the manor must necessarily have been fixed and settled by perambulations, or metes, or other means, previously to the grant to the lord of the manor ; the shore therefore would still remain *dehors* the manor, and would not pass by a conveyance of the manor *simpliciter* ; and so the right to the shore and the right to the manor might come into the hands of different individuals. The seashore, however, is always

¹ 4 De G., M., and G., 206, decided by the Lord Chancellor (Lord Cranworth), assisted by Alderson, B. and Maule, J.

² This is the declaration of the line, made on the order on further directions in the cause *A. G. v. Chambers*, dated January 22, 1855, and expresses the rule in more popular terms than are used in the judgments as given in the report of 4 De G., M., & G., 206.

³ *De Jure Maris*, Harg. Law Tracts, p. 26 ; see Constable’s case, 5 Rep., 107 a, 2 Rol. Abr., 170.

within and part of the county ; it may be part of the manor, but, *primâ facie*, it is not within the parish next contiguous or adjacent. The onus of proof that it belongs to the manor lies on the claimant ; and on a question of rateability the onus is on the party claiming the rate, to prove that it is within some parish ; for, *primâ facie*, it is extra-parochial. The proof may be by means of perambulations, common reputation, known metes, and bounds, &c. From all this it follows that the owner of a pier, part of which is below low water-mark, part between high and low water-mark, and part above high water-mark, is not rateable for the part between high and low water-mark, unless on the part of the rating parish it is made out that the foreshore belongs to it. The part above high-water mark is of course rateable under the usual conditions in the parish in which it lies ; the part below low-water mark lies in no county (except in the case of an arm of the sea, within the points of the shore), in no case can it be within the manor or parish ; and it is wholly unsusceptible of rates.¹ The same things would be true in respect of the wire or line of a submarine telegraph, and of all jetties, stairs, landing-places, &c., on the seashore, or on the banks of tidal navigable rivers. The same is probably the law in respect of coal-mines, but not of any other description of mines. A coal-mine, as regards any portion of its workings which may be below low water-mark (as is the case with some of the mines in Cumberland, which are wrought to great distances under the bed of the sea,) is not rateable ; as regards the portion between high and low water mark, it may be rateable if it can be proved that the foreshore is part of the parish.

Hence the Norfolk Estuary Act, 1857, provides that the Norfolk Estuary Company, incorporated for the purpose of reclaiming from the sea, &c., the two tracts of land, &c., being parts of The Wash, situate between the counties of Norfolk and Lincoln, shall embank, &c. ; and that so much of the land as shall be so embanked, shall be deemed and considered as locally situate in the county of Norfolk, except such parts thereof as are thereafter declared to be situate in any parish in the said county of Lincoln,

¹ See Com. Dig., tit. Navigation, A. De Jure Maris, Harg. Law Tracts, 26, 27 ; Reg. v. Masson, 4 Jur. N. S. 111.

and the Queen in council is empowered to declare to what parish embanked lands are to belong, or to constitute distinct new parishes within the said tracts.

The usual mode of proving the shore to belong to the adjacent proprietor, is by showing the usual getting of sea weed, shingle, sea-sand, licensing others to do so, enclosing and embanking against the sea, and enjoyment of what is so inned; enjoyment of wrecks happening thereon, presentment of encroachments in the Court Baron of the manor, and punishment of the same there.¹ Sea-weed growing below low water, the lord of the adjacent manor even proving his right to the seashore, cannot set up a claim to the exclusive right of cutting, unless in virtue of a royal grant, because, as has been said, the *fundus maris* is in the Crown.²

In the United States of North America the settled principle is this:—The people have the absolute proprietary interest in the seashores, and the shores of navigable rivers where the tide ebbs and flows, though the soil of them may, by grant or prescription, become private property. In the state of New York, the rule laid down with respect to sea-weed is:—That if it be cast on the seashore by slow degrees and gradual accumulation, it belongs as a marine increase, to the riparian proprietor;³ and there, no more than in this country, is it the property of the first occupant. In Connecticut the courts hold a riparian proprietor on a navigable river, or arm of the sea, not to be entitled to the sea-weed which grows in the bed below low water-mark, it belongs to the public;⁴ and generally the land under navigable waters, in front of the upland, as it is called in America, that is permanently dry land as we call it, is in the state.⁵

¹ Harg. Law Tracts, p. 26; Constable's case, 5 Rep., 107; Calmady v. Rowe, 6 C.B., 861; Duke of Beaufort v. May, &c., of Swansea, 3 Exch., 413; Sadleir v. Biggs, 4 H. of Lds. 435.

² Benest v. Pipon, 1 Knapp, P. C., 60.

³ Ewans v. Turnbull, 2 Johns., R. Supreme Crt. of N. York, p. 314, 315, decided temp. Kent, C. J.

⁴ Chapman v. Kimball, 8 Connect. R., 38; 3 Kent Comment., 522, n.

⁵ Furman v. City of New York, 5 Sandf. Sup. Crt. R., 16; Gould v. Hudson Riv. Co., 12 Barlow's R., 616; Rundel v. Delaware Railway Co., 14 Howard R., 80.

With respect to land relict by the sea, accretions or *batture*, the *cantilena* is well-known which, in English law, gives gradual formations of this kind to the adjacent proprietor, sudden to the Crown; the one being an instance of the maxim *de minimis non curat lex*—that which cannot be perceived in its progress is taken as if it never existed at all; the other following from the fact of the property in the bed of the sea being vested in the Crown, and therefore not diverted out of it, by becoming by some convulsion or accident of nature, at once uncovered and left dry by the sea. The Roman, Spanish, and French laws were much and fully discussed, and, according to Chancellor Kent, with profound research, in a case before the Supreme Court of Louisiana.¹ As to the parochiality of accretions, or tracts of land left by the retirement of the sea in this country, it seems, that although the shore itself is *primâ facie* extra-parochial, yet that, as it may be within a parish, so may its accretions, and be titheable according to the treatise *De Jure Maris*.² As to the rule of the English law respecting gradual accretions going to the adjacent land; it is the common law of most countries in Europe, as stated by Puffendorf:—*Illa incrementa, cum sensim fiant, publicis redivitibus, parum momenti videntur afferre; inde multis civitatibus humatunum fuit visum, istas alluviones concedere iis quorum fundis accesserunt Quod si tamen alluviones magni sint momenti, et quæ mensuram privati fundi longè excedant ad publicum pertinere indicabuntur.*³

Such being the nature in law of accretions, or land derelict by subsidence where the sea is retiring, what is the case when the sea is gaining on the land? Supposing a deed conveying the seashore for a given length, measured along the coast line or seabord, can there be a case in which this space of land shifting in situation may vest in the grantee at different times? The case of a moveable freehold, put in Co. Litt. 48 b, is familiar; but it is there laid down that there may be such a thing as a moveable freehold, in a given quantity of land fixed in situation of which,

¹ Municipality, No. 2, v. The Orleans Cotton Press, 18 Louisian. R., 122. See R. v. Lord Yarborough, 3 B. and C., 391.

² Harg. Law Tracts, 27; see R. v. Oldsworth, Id., 30.

³ Puffend., De Jure Nat. and Gent., lib. iv. cap. vii. s. 12.

part from time to time may be vested in A, and the other vested in B, which is obviously not the case now before us. But upon considering that the bed of the sea is in the Crown, and that the right to the seashore is *primá facie* in the Crown, and can only be in a subject by express grant from the Crown, and not under a grant of the adjacent manor, as implied therein (for the seashore forms no necessary part of or appurtenant to the manor as such), we see that the Crown, by a grant of the seashore, would convey its own right in respect of the seashore; that is, not the right to that soil which at the date of the grant is between the medium high water-line and the low water-line, but to that which, from time to time, shall be between those boundaries; so a grant of wreck or of treasure-trove places the grantee exactly in the position of the Crown with respect to the subject-matter of it for all future time: he takes all that the Crown could have taken had the grant never been made. The result is, that where the grantee has a freehold in that which the Crown grants, his freehold shifts as the sea recedes or encroaches, and the same will be the case of *his* grantee, unless the sub-grant is made with proper restrictions and exceptions. Such deeds will be construed with an eye to the rule of the common law on the subject of accretions, and as the boundaries of the shore seaward and landward shift, the property conveyed also shifts; so where the sea is gaining on the land imperceptibly, the land thus added to the bed of the sea accrues to the Crown.¹ These principles are occasionally found to be applicable on questions respecting the right of taking away boulders, gravel, &c., on the sea-beach, and also sometimes on questions respecting oyster-beds, the right to take fish, shells, the forming of railway lines, &c. The principle of the sovereign being owner of the bed of the sea around the coast, and for a breadth of at least three miles from it, would be applicable to determine, on appeal to the courts, some questions between submarine telegraph companies, and persons sailing or fishing in the sea over the cable: one of which—namely, the interference caused by such a company's buoys with fishermen's nets off the north-western coast—was made matter of complaint in parliament

¹ *R. v. Yarborough*, 3 B. & C., 91; In *Re Hull & Selby Railw. Comp.*, *Scratter v. Brown*, 4. B. & C., 494; 5 M. & W., 327.

in the course of last session, when the answer given was, that the buoys in question were only temporary, having been put down for purposes connected with the repair of the cable, &c., and would be removed as soon as practicable.¹

The principle which gives the seashore to the sovereign has been stated to be this, that it is land not capable of ordinary cultivation or occupation, and so is in the nature of unappropriated soil,² or perhaps it may be considered as a consequence of the permanent bed of the sea having been held to be vested in the Crown, inasmuch as the shore, being covered by the sea twice in every twenty-four hours, partakes more of the nature of the bed of the sea than the adjacent land above high water-mark, which is permanently dry, and therefore the shore may be regarded as belonging to the bed of the sea, and to vest in the Crown as a kind of prolongation or part of that bed; but, however that may be, it is certain the advisers of the Crown for the last quarter of a century have exercised unusual vigilance respecting, and been most active in realizing, the royal claim to the foreshores. Accordingly the matter has awakened a deep interest in the maritime districts, and among landed proprietors, persons interested in harbours, quays, mines, &c., whose property may turn out to be affected by these claims, which have so long lain dormant as to have been to a great extent overlooked altogether. Such is the degree of this interest, that the parliamentary paper, the title of which we have placed at the head of this article, is now we understand out of print, probably because it gives a view of the nature of the cases in which claims have been raised, with some means of estimating the expenses of a contest, and states the course which has been adopted in each case. We have thought it possible by this article to promote the objects of such inquirers.

The principal points in the law of the foreshore, so far as it has hitherto been developed in the English courts, have been stated, together with references to other systems of law, and to some American cases and authorities, which, though not of direct weight here, frequently afford arguments of a superior character,

¹ 150 Hans. Parliam. Debates, col. 1732.

² Per Lord Cranworth, 4 De G., M., & G., 218.

and deal with certain questions on this subject in such a style as might not impossibly supply the *ratio decidendi*, when those or similar questions arise in our own courts. We may now point out the state of things shewn by the proceedings by the Crown, to which we have adverted.

Since the 1st of September, 1833, no fewer than twenty-four suits have been instituted on behalf of the Crown, in assertion of its rights to the foreshore in Great Britain and Ireland, and the Isle of Man. These proceedings have been chiefly in the form of informations of intrusion in the Exchequer, and informations in Equity to establish the rights of the Crown. One of them took the singular shape of a plaint in the county court of Sussex, entitled, "Her Majesty's Attorney-General against William Knight," and issued in May, 1857, in the Attorney-Generalship of Sir Richard Bethell, to assert the right of the Crown to certain seashore near Littlehampton, in that county, between high and low water-marks, and to recover nominal damages for a trespass committed by the defendant in removing boulder stones from the shore in question. The proceedings were commenced by the Attorney-General upon the representations of a body of landed proprietors whose estates adjoined the seashore, as to the injuries which they sustained from a practice very extensively carried on, of removing boulder stones from the beach, whereby serious damage was being caused to the adjoining frontage, and the measures taken by the landowners for the protection of their estates from the sea were rendered nugatory. Towards high tide the sea breaks upon that coast at times with tremendous force. The plaint was heard, and judgment given in favour of the Crown, the defendant being ordered to pay five shillings damages, and 17s. 10d. for costs.

In two similar cases in 1856 and 1857, subpoenas issued out of the Court of Exchequer to answer an information for intrusion, against a person who had been in the habit of taking shingle from the shore, and both resulted from complaints made by the owners and occupiers of property under the east cliff at Dover, that the defendant had removed large quantities of shingle from the beach, thereby weakening the defences of the frontage properties against the force of the tides. In each case the suit was discontinued

before the information was filed ; the defendant in the first having paid one shilling as an acknowledgment of his trespass ; and in the second, having paid the amount of a royalty after the rate of eightpence for thirty loads of shingle, the quantity improperly removed. An earlier case was one of an information for intrusion, filed in 1833 by Sir William Horne when Attorney-General, in the Court of Exchequer, to establish the right of the Crown to a tract of land containing about 270 acres, formerly overflowed by the tide, situate near to the city of Chester, on the south bank of the Dee, a tidal navigable river. The suit terminated in favour of the Crown, and the land was subsequently sold by the Crown to the Marquis of Westminster, for the sum of £7500. Perhaps the most remarkable of all these cases was the information filed in 1844, in the Court of Chancery, to establish the right of the Crown to the bed and shores of the river Thames, within the flux and reflux of the tides, and to certain encroachments upon those shores, which have been made under licences granted by the Corporation of London, who were admitted to be conservators of the river, but who claimed also to be owners. The result was in favour of the Crown, after an expenditure for costs incurred on its behalf of upwards of £5125, terms of arrangement being come to which may be seen in the Thames Conservancy Act, 20 & 21 Vict. cap. cxlvii. (local and personal). The corporation thereby withdrew all claim to the ownership of the bed and soil of the river, and admit that the Queen's Majesty is seised for herself, her heirs, and successors, of the fee-simple and inheritance in possession of the bed and soil of the Thames, &c. The corporation paid £5000 to the Queen, and by the act the Crown is entitled, in addition, to one-third of the proceeds of all sales and grants of foreshores, to be made after December 31, 1853, by the conservators thereby appointed. Shore is in the act defined to mean "the shores of the river, so far as the tide flows and reflows between high and low water-marks, at ordinary tides." No one can embank without licence, s. 54. There is next a curious provision, that in the case of land so embanked with licence, it shall vest in the persons owning the land, in front of which the embankment is made, for the same estates and interests, &c., that such person has originally, and to be of freehold tenure if that land is freehold, and to be of

copyhold tenure if the frontage owner's original land be of copyhold tenure, s. 55. Now, it is held clear'y that a copyhold must be time out of mind, and cannot begin at this day; it must have been demised or demisable from time immemorial. A copyhold is not a creature of law, but of custom and fact; it cannot be created by *operation of law*, and though it has been said that a copyhold may be created by the express words of an act of parliament, because the act might operate as an estoppel to any man, to say that it had not existed time out of mind, that was only obiter and extrajudicially.¹ However, there are precedents in the private acts of 35 Henry VIII., cap. 13, and 37 Henry VIII., cap. 2, for creating copyhold tenure by statute. A matter not of speculation like this, but of practical importance, settled by the Thames Conservancy Act, is the following:—The owner of a vessel when sunk by mere accident in the Thames was not bound, the Court of Common Pleas decided some years back, to place a buoy to denote the spot and so prevent accidents;² but by s. 86 of this act, power is given to the conservators to raise sunken vessels, and to sell the vessel to defray the expenses, if the master of the vessel refuses after notice in writing, and within the time mentioned in the notice, to proceed to weigh and raise the vessel, and, if it be impossible to weigh it, the conservators may blow it up, &c., with gunpowder.

It may be well to bear in mind, in connection with the subject of claims on behalf of the Crown to seashore, that by a late act the commissioners of woods, &c., are empowered, with the consent of her Majesty, to make arrangements for the adjustment or settlement of any doubtful or disputed rights or claims of the Crown to any real property, the management or control whereof would, if such rights or claims were established in favour of the Crown, be vested in, or devolve upon them,³ &c.

As is well known, there are in various parts of the coast mines or coal-pits carried on under the sea. For instance, the submarine excavations of the Howgill coal-pits, west of Whitehaven, in Cumberland, extend more than 1000 yards below low water-

¹ *Revell v. Jodrell*, 2 T. R., 425; *Townley v. Gibson*, 2 T. R., 705.

² *Brown v. Mallet*, 5 C. B., 599.

³ 16 and 17 Vict. c. 56, s. 5.

mark, and about 600 feet below the bed of the sea. Doubtless, the law considers the property in all such mines to be vested in the Crown ; so of mines under the seashore. The case of the Attorney-General v. Chambers, and other defendants above referred to, proves among other cases this. It was an information in Chancery, filed to establish the right of the Crown to certain tidal navigable rivers in Carmarthenshire, and to the mines of coal under, and to certain alleged encroachments upon, the said shores, and the result is substantially in favour of the royal claims, an arrangement having been made with most of the parties, under the statute just mentioned, in this, and the parties in two other informations filed for the same objects. The costs of the Crown in these proceedings, which were commenced in 1845, therefore before the Crown was made capable by statute of recovering costs when successful, has been estimated at £5000. In pursuance of part of the arrangement, the Crown granted a lease for thirty-one years of part of the land recovered, together with certain smelting-works erected on it, reserving the minerals, and full liberty to work the same, at a rent equal to the value of the land alone, by virtue of 8 and 9 Vict., c. 99, s. 2, which empowers the commissioners of woods, &c., to do this when buildings have been erected on the land in ignorance of the Crown's title. In another case, the attention of the Crown officers having been called to the fact, that the lessees of Lord Mostyn were raising large quantities of coal from under the western shore of the river Dee, opposite the manor of Mostyn, in Flintshire, being part of a larger quantity of marshes and sands, to which the title of the Crown had been found by inquisition in the third year of William and Mary, an information was filed in Chancery in assertion of the claim of the Crown, but it was discontinued, in compliance with the joint opinion of the then attorney and solicitor-general, and two other learned gentlemen, on a view of all the facts of the case, and the evidence which the defendant appeared to be in a condition to adduce. Another information to establish the right of the Crown to coals, and mines of coal lying under another part of the western shore of the Dee, is still pending.

In like manner, the claim to other submarine mines has been attended with success. The Botallack mine is described as one

of the most wonderful of the excavations of Cornwall. It is a copper mine, containing also tin and iron; it is situate at the extremity of the great copper and tin lodes, which run eastward through Cornwall, as far as the Dartmoor Hills. At one period the working left a profit of £300,000; but the veins have of late become thinner and poorer in the direction in which alone they are workable. It was formerly worked for tin; copper was found in it in 1841. This mine extends horizontally 480 feet under the bottom of the ocean, or, below low water-mark, at a depth of twenty fathoms below the sea level, measured vertically. An information, filed 10th Sept., 1855, against Lord Falmouth and others, his lessees, to establish the right of the Crown to the minerals in this mine, resulted in favour of the claim, Lord Falmouth accepting terms of arrangement. These were, that he should accept a lease from the Crown or the Duchy of Cornwall, of so much of the Botallack mine as is situate under the shore and bed of the sea below high water-mark, for twenty-nine years, from 10th Sept., 1855, at royalties of one seventy-second part of the monies for which the tin, and one fifty-fourth part of the monies for which the copper, and all other minerals except tin, raised from the said mine, within the above limits, should have been made merchantable, but all claims to royalties in respect of minerals raised prior to the above date were remitted. The mine, it is to be observed, is worked solely through the land of Lord Falmouth above high water-mark; in fact, the mine is entered in the side of a cliff beetling over the Atlantic; and, from the nature of the locality, the minerals under the sea probably could not be got by any other mode of access than the one which, at immense outlay, has been rendered effectual.

So railway companies have been restrained, on the information of the Attorney-General, from using such parts of their railways as were constructed without the licence of the commissioners of woods, &c., and from constructing floating piers and other works, on the seashore, or below high water-mark; and such companies have been obliged to come into the terms offered on the part of the commissioners.

Some proceedings by the Lord Advocate of Scotland respecting the river Clyde, terminated by an adverse decision of the House

of Lords, as regarded certain pecuniary claims made on behalf of the Queen; but the right to the alveus of the river was held to be undoubtedly in the Crown, and the same right has been established in two cases arising in respect of the alveus of the river or Firth of Tay, and fifty-four parcels of it have been sold to different individuals and companies.

There is another class of cases in which the title of the Crown to property of this description has been admitted, since 1830, without litigation. These peaceful successes are very numerous, and comprise parcels of land, varying of from four perches to 289 acres in extent, and leases have been granted at rents, in all cases it would seem, of the full estimated value of the land, &c., demised. In cases where sea-beach has been leased in addition to the rent, a royalty is reserved of so much a ton on the stones carried away off it. The 289 acres just mentioned, is a tract of land called Ferriby Sands, formerly overflowed by the tidal waters of the Humber, which was reclaimed and is maintained at the expense of certain individuals to whom they have been leased for twenty-one years from 5th April, 1841. In numerous cases of this class, the Crown's interest in the lands has been sold for sums varying from £4 10s. to £60,000, which sum is the purchase-money of fifty-nine acres formerly overflowed by the tidal waters of the Mersey, and reserved to the Queen under the provisions of the Birkenhead Docks Act. The Manchester, Sheffield, and Lincolnshire Railway Company have paid £6250 for about thirty-three acres adjoining the docks belonging to the company, and reclaimed and embanked at their expense under 8 and 9 Vict., cap. ccii., the Great Grimsby Dock Act. Free grants have been made in some instances, comprising in the whole land to the extent of between 300 and 400 acres.

Besides all this, in a very large number of acts of parliament, private and otherwise, passed between 1830 and the close of the session of parliament of 1857, clauses have been inserted either containing provisions for the protection of the interests of the sovereign in lands subject to the flow of the tide, or recognition of the title of the Crown to particular portions of the bed of the sea, or the shores of the sea, or of navigable rivers below high water-mark, and vesting the property of her Majesty therein in

corporations or individuals, or containing provisions empowering the Crown, or the commissioners of woods, &c., to make leases or conveyances thereof, in England, Scotland, and Ireland. In many cases, also, sums have been paid to the Crown for permission to take stones and raise gravel from the sea-beach, to build bridges, to lay down sewage pipes, &c., on the shore of the sea or navigable rivers; facts showing the vigilance with which these rights are claimed.

Some reference has before been made to the submarine mines of Cornwall. In the course of the present year a curious question has arisen and been settled (by statute) respecting them. The question was, who is entitled to the minerals on the coast of that county, lying between high and low water-mark, and also to the minerals below low water-mark, but won by the extension of workings commenced above low water-mark; is the Queen the owner in right of the Crown, or the Prince of Wales in right of his Duchy of Cornwall? Both her Majesty's government and the Council of the Duchy, considering it to be highly desirable to have these questions set at rest without adverse litigation between her Majesty and the Prince of Wales, it was determined to obtain the opinion of the Right Hon. Sir John Patteson, "as a gentleman whose eminence as a lawyer, and whose independent character and position, will give such authority to his determination as to afford satisfactory ground for an act of parliament to give effect to it, if such a measure should be found necessary." Sir John accordingly made his determination or award, stating in substance, that having considered all the statutes, charters, documents, and cases which had been produced or referred to by the counsel for the Crown and for the Duchy, and also all the arguments which had been adduced, he was of opinion that, as between the Crown and the Duke of Cornwall, the right to the minerals between high and low water-mark has passed to, and is vested in the Duke of Cornwall as part of the soil and territorial possessions of the Duchy; but that the right to the minerals below low water-mark remains, and is vested in the Crown; although those minerals may be won by workings commenced above low water-mark, and extended below it. The award proceeded to express an opinion, that as these last-mentioned

minerals obviously cannot be won by the Crown, otherwise than by workings commenced above low water-mark, in the soil and territory of the Duchy, provision ought to be made, that the Crown should be authorized by itself or its lessees to use all shafts and workings already made, or hereafter to be made, by the Duchy or its lessees above low water-mark, for the purpose of winning the minerals below low water-mark; and also to sink, make, and execute any new shafts or workings which may be necessary for that purpose, on the soil and territory of the Duchy above low water-mark. That the Crown, whilst using any of the workings made by the Duchy, should keep the same in good and proper order and repair, and should pay to the Duchy, for the use of the soil above low water-mark, one-tenth part of the net proceeds of the minerals won below low water-mark, after payment of all expenses, &c. Some objections having been made to the terms of this decision, on the part of the commissioners of woods, &c., *ex. gr.*, that the Crown would have no means of ascertaining what the net proceeds of the workings are, whereas the reservation to the Duchy of any fixed proportion of the gross proceeds might prevent the Crown from making advantageous arrangements with the frontage proprietors; also that portions of the foreshore are claimed by lords of manors adversely to both the Crown and the Duchy; and that, in cases of the substantiation of such claims, it would be reasonable that the Crown should be relieved from the obligation to pay any wayleave to the Duchy for the power of driving levels through the lands between high and low water-mark which in that case would be the property of individuals whom the Crown must compensate; Sir John Patteson made a further award. He thereby decided that the right to the minerals under estuaries and navigable rivers, and other places in and part of the county of Cornwall, is as between the Crown and the Duchy in the duchy, and stating that he had considered himself to have no authority with regard to cases in which the foreshore is claimed by private individuals; he decided that, where such claim can be established, the Duchy can have no right to the minerals either between high and low water-mark, or below low water-mark, and the Crown will make its own terms with the owners of the land and foreshore, and will pay nothing

to the Duchy. It was subsequently proposed on behalf of the Crown, and accepted on behalf of the Duchy, that when the workings by the Crown lessees were confined to foreshore land, pared of the possessions of the Duchy, the compensation to be made by the Crown should be one-fifteenth part of the net dues or monies received from its lessees, in addition to compensation for any injury to wharves or other structures on the shore; and that, inasmuch as it would be impossible to fix by anticipation any rate of compensation which would meet the justice of every case where the workings were carried on upon land above high water-mark, and which might be occupied as farms or otherwise, such compensation should in case of dispute be settled by arbitration in each case as it should arise. Accordingly an agreement was entered into between the Crown and the Duchy, to submit a bill to parliament for ratifying the award, and this has been done, and "the Cornwall Submarine Act, 1858," ratifies the award with some variations. We have entered into these details on this subject, both because they comprise the settlement of an interesting question of law, and as they furnish another illustration of the importance which has been attached of late years by the advisers of the Crown to its seashore and marine rights. One observation seems to arise upon the first section of the above-named statute (21 and 22 Vict., cap. 109), which enacts and declares all mines and minerals lying under the seashore, &c., within the said county of Cornwall, &c., are, &c., vested in the Prince of Wales in right of the Duchy of Cornwall, *as part of the soil and territorial possessions of the said Duchy*; but this declaration is not to extend to the mines and minerals in or under land below high water-mark, which is part and parcel of any manor belonging to her Majesty in right of her crown. That appears to amount to a declaration that the seashore is part of the soil and territorial possessions of the Duchy, except in cases of seashore adjacent to any manor belonging to the Crown. If so, it follows that the right to sue for trespasses on the seashore of Cornwall, and the right to grant licences, or permission to build piers, jetties, &c., for the purpose of the pilchard fishery, &c., to take boulder stones, shingle, sand, &c., from the beach, is in the Duchy, and not in the Crown. Possibly it would have been better, certainly it would have been

more in accordance with the usual mode of drawing acts of parliament in similar cases, to have inserted a clause shewing the right of getting sand below high water-mark, given by stat. 7 Jac. I., cap. 18, "to all persons resident and dwelling in the county of Cornwall, to fetch and take sea-sand at all places under the full sea-mark, where the same is or shall be cast by the sea, for the bettering of their land, and for the increase of corn and tillage at their wills and pleasures." Probably, however, the question will not soon arise in practice; still it is not wholly without some claim to consideration, because manure of sea-sand and blown-sand is extensively employed in this county (as it also is in Devonshire). The estimated quantity of sand (chiefly composed of comminuted sea-shells) which is annually conveyed from the coast, and spread over the interior as manure, is said to be not less than about 5,600,000 cubic feet; with respect to blown-sand, or sand which has drifted and been carried by the wind on to land above high water-mark, there seems to have existed in this county from very ancient times, a practice of going upon such land, exercised by occupiers of other lands, and even lying in other parishes, and getting and taking away such sand for use as manure, or top-dressing, though it is certain that in law such practice cannot be supported on the footing of custom, as the sand, when so drifted and blown, becomes part of the soil, and there cannot be a custom to take a *profità prendre in alieno solo*.¹ Perhaps the nearest approach to an authority to the contrary, is the case where a custom was pleaded for all persons residing in a parish, whose duty required them to amend the highways within the parish, to dig up and carry away stones and shingle from the plaintiff's close, being part of the waste land between high and low water-mark, without any question being there made whether or not such a custom was valid in law.²

We have chosen this subject as being one both of permanent and immediate interest, and having endeavoured to treat it so as to set forth the principal points in it, with illustrations which, perhaps, will not readily be found elsewhere. Collected together, we will express a hope in quitting it, that such proof may be discovered by the reader, of an intention and desire to render the article useful, as may make unnecessary any apology for its length.

¹ *Blewett v. Tregonning*, 3 A. and E., 554.

² *Oxenden v. Palmer*, 2 B. and Ad., 236.

ART. VIII.—THE NATIONAL ASSOCIATION FOR THE PROMOTION OF SOCIAL SCIENCE.

WE here present to our readers a *resumé* of such part of the proceedings of the recent congress at Liverpool, as bear directly on Law Amendment, or subjects therewith connected. To do more than this would have been impossible within the space at our command; and indeed would have been irrelevant, regard being had to the objects which this Magazine aims exclusively at promoting. To do less than what has been here done, would have been to fail egregiously in what is due from us to the profession and the public.

Lord John Russell, the President of the Association, in his opening address, delivered in St. George's Hall, on Monday, Oct. 11, remarked, *inter alia*, upon various important matters falling specially within our province. Adverting in the first place to Jurisprudence and Law Amendment, together with punishment and reformation as subjects in a great degree connected, his Lordship said, with reference to—

LAW OF BANKRUPTCY AND INSOLVENCY.

At our meeting (held at Birmingham) last year, the question which excited the greatest interest in the department of jurisprudence was the amendment of the bankruptcy law. After some valuable papers had been read, and much practical discussion had taken place, the Association agreed upon my motion to appoint a committee, consisting of three delegates from the National Association, and two delegates from each of the chambers of commerce and trade protection societies in the kingdom. This committee met on the 4th and 18th of November, at Birmingham. They agreed to a series of resolutions, which were afterwards embodied in a bill and laid before the committee in London. The provisions of this measure have been ably explained by Mr. Hastings, in an address delivered by him on the 20th of May last. I will shortly advert to the main provisions of the bill. In the first place, the bill consolidates and amends all the statute law relating to bankruptcy and insolvency. It is proposed that the Insolvent Court of London and the separate insolvent jurisdictions of the county courts should be abolished, and that the law of bankruptcy and insolvency should henceforth be administered by one tribunal. It is not meant to contend by this proposal that there is no difference between bankruptcy and insolvency. The merchant whose expectations have been frustrated by a sudden fall in the price of silk, or a sudden rise in the

the instant obedience, have passed away. The pride of empire, the kings waiting in the antechamber, the sway of a mighty will from Rome to Hamburg, from the Manzaneros to the Elbe, have vanished as the baseless fabric of a vision. But the transactions between man and man, the trial of the offender, the adjudication of property throughout the French empire, are still regulated, and probably will long be regulated, by the statutes of the immortal legislator. Let us take a more recent example. Not many years ago the State of New York determined to revise their laws. In 1827, the revisers, John Duer, Benjamin F. Butler, and John C. Spencer, made their report to the Legislature. In a note to each section which they proposed for enactment, they stated fully and clearly the then existing defects of the law, and the manner in which, in their opinion, the proposed section would remedy such defects. Thus the Legislature had clearly before them, first—the existing law ; secondly, its presumed defects ; thirdly, the proposed remedy. The result was so satisfactory that, in special session summoned for that purpose, the Legislature of the state of New York, adopting in most cases the opinions of the revisers, consolidated their code of laws. The laws of Louisiana have been revised in a similar manner, with the assistance of men of the highest reputation for knowledge and ability. If we now proceed to consider what has been done in this country, we shall find that, from the days of Lord Chancellor Bacon to those of Lord Chancellor Chelmsford, the revision and consolidation of the law have been a consummation devoutly to be wished. Five years ago the enactment of a code was held out to our expectations ; each year we were said to be at the beginning of the beginning. Three administrations and four sessions of Parliament have promised, undertaken, and dropped the work. Is it not time that we should set about the task in earnest ? I will venture to say that, if four or five persons of competent qualifications were appointed as commissioners, they would in a few months make an actual commencement, and in a few years present to Parliament a complete code worthy of the country, simplifying and improving our laws, on principles fit to be adopted in an enlightened age, and founded on the solid masonry of our ancient legislation. Nor can I doubt that such a work would be sanctioned by Parliament, not indeed without debate, but without serious delay.

LAW OF REAL PROPERTY.

I am now about to speak of two subjects as examples of what I should wish to see—one, the amendment of the law of real property ; the other, the revision of the criminal law.¹ Our law of real prop-

¹ Labor's Law of Real Property of the State of New York, p. 120, note 4, section 15:—"The absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except in the single case mentioned in the next section." Section 16:—"A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty years, or upon any other contingency, by which the estate of such persons may be determined before they attain their full age."—Revised Statutes of the State of New York. An Act concerning the Acquisition, &c., of Property, Real and Personal, &c.; title 11, act 1, sections 15 and 16.

perty is involved in a maze of technical difficulties. It has been truly said to be the most abstruse branch of English jurisprudence. Of the Code Napoleon, on the other hand, it has been said—"In the civil law the regulations concerning the enjoyment, alienation, and transmission of real estate, comparatively speaking, are neither numerous nor difficult to be understood; and, in the Code Napoleon, they form a very small and perfectly intelligible portion of that immortal work. It is not extravagant to say that the French law of real estate may be sufficiently understood by a few days of diligent study.¹ The revisers of the state of New York have laboured to introduce simplicity into their amended law of real property. They have, with this view, proposed that no disposition of real property should extend beyond the lives of two persons living at the time of the creation of the estate, who should live to attain their majority. This provision now forms part of the law of New York. I am not saying we should adopt this provision: it may act harshly in some instances—it may sweep too widely in others. Lord St. Leonards, however, whose "Handbook of Real Property" is a boon to the whole community, has expressed his opinion, that a young society ought not to be entangled in the complications of our law of real property.² But, if so, why should an old society not make an effort to be free from them? I recommend this important subject to the special consideration of the department of Jurisprudence.

CRIMINAL LAW.

I proceed to our criminal law. Our judicial statistics, it is well known, are very incomplete; indeed, we have hitherto had no information of any value giving the results of the proceedings of our civil courts. With regard to criminal trials and their results, we have, indeed, valuable annual returns, drawn up by a very intelligent officer attached to the Home Department—I mean Mr. Samuel Redgrave. From the return presented to Parliament, I am about to quote the results of the trials which have taken place on several subjects of criminal jurisdiction. Those are the offences of—1st, shooting at, stabbing, or wounding; 2nd, robbery; 3rd, burglary; 4th, house-breaking; 5th, larceny in a dwelling-house; 6th, forgery and uttering forged instruments. The returns show the numbers convicted, sentenced to death, and executed for these offences in one year, in every ten from 1817 to 1857, or, in other words, the changes which have taken place in forty years. I give you the results:—

	Convicted.	Sentenced to Death.	Executed.
1817.....	912.....	911.....	78
1827.....	1113.....	1118.....	41
1837.....	1081.....	405.....	None.
1847.....	1498.....	18.....	None.
1857.....	2057.....	21.....	None.

¹ On the occasion of an intimation that an edition of Sugden's Treatise on Powers would be required in America, Lord St. Leonards writes—"I regretted at the time that a new state should embarrass itself with our forms of conveyancing, springing out of the doctrine of uses."—(Letters of J. Humphreys, p. 56.)

² First Report National Ref. Meeting, 1856, p. 115.

The population of Great Britain has increased from 1811 to 1851, in round numbers, from 12,000,000 to 21,000,000, and in England and Wales from 10,000,000 to 18,000,000. You will perceive that convictions have increased, and in a greater proportion. Upon examining these returns more in detail, there is a further result, namely, a great increase in crimes accompanied with personal violence. Thus, the numbers convicted of shooting at, stabbing, or wounding, has increased between 1817 and 1857 from 26 to 208, and of robbery, from 154 to 378; while larceny in a dwelling-house has only increased from 143 to 246. Burglary has increased from 374 to 473; housebreaking, from 152 to 568; forgery, &c., from 62 to 184. It would be very desirable to have more complete information on these several heads. It is very important to ascertain whether the repeal of capital punishment has led to greater readiness to prosecute on the part of the injured, and greater readiness to convict on the part of juries; and, lastly, whether and to what extent crime has really increased. Some information on these heads is no doubt to be gathered from the criminal returns; but much more remains behind which is not ascertained. There is one conclusion, however, to which I think we must all come. If high treason and murder are to be the only offences for which capital execution is in future to take place, those crimes alone should have capital punishment affixed to them by law. The sentence of death ought no longer to be a vain form, somewhat lightening the penalty actually inflicted on the offences for which death is only the nominal punishment. Leaving this consideration, a question of the utmost consequence to society arises in the present state of the law. The punishment of death being nearly discontinued, transportation to a colony virtually abolished, it has become a necessity for us to consume our own crime, and not to send it forth to contaminate other parts of the world. Hence it is a problem of the deepest interest to us to ascertain in what manner the thousand of criminals whom we used to send to Australia can be most effectually punished for the sake of example, and most effectually reformed for their own sake and that of the community. Considering how recently this problem has been submitted to us, and how difficult is its solution, we may, I think, be satisfied with the progress we have made. Under an act passed at the suggestion of the Duke of Richmond, more than twenty years ago, inspectors of prisons were appointed, of whom Colonel Jebb was the chief. Under a subsequent act, a board of directors of convict prisons in Ireland was established, of which board Captain Crofton is the chairman. Colonel Jebb has been for some years intrusted with the charge of all the government prisons in England. He has made several very able reports on the system he has pursued. Mr. Hill, the recorder of Birmingham, read in the Town-hall, at our meeting of last year, a most instructive paper on the Irish system, in which he declared, that the question, "What shall we do with our convicts?" had been practically solved. There are, indeed, some differences of opinion as to the results obtained between Colonel Jebb and Captain Crofton. Leaving them aside for a

moment, it is sufficient for our purpose to record the following net product of our experiments :—1. When a person charged with a criminal offence is sent to prison before conviction for safe custody, it is essential that he should be kept separate, and not turned loose into a company of notorious offenders, to corrupt and be corrupted. 2. That after conviction the criminal should be confined separately for a limited time, in such a manner that solitude, enforced sobriety, and the exercise of industry, as his sole recourse against weariness, may prepare him for a better course of life. It would be unwise to transfer him at once in his subdued state to a condition of freedom, when his very want of energy would probably lead him back to crime. 3. After separate imprisonment, the convicts in England and Ireland have, with the best effects, been removed to prisons, where each has a separate cell for sleeping, but where the work is in common. 4. The board of directors in Ireland have introduced a plan of intermediate prisons, where the best-conducted prisoners are relieved from military or police guards. The convicts have, however, their appointed work, their rations, their gratuities. At this period they are allowed to obtain by inquiry promises of employment on their discharge. When these promises have been ascertained to be trustworthy, the prisoner is set free, but for the unexpired period of his sentence he remains under the supervision of the police. 5. The passage from one class to another, and the distribution of gratuities, is regulated by the number of marks obtained for good behaviour. The principle of this plan was, I believe, originally suggested by Captain Maconochie. The general results of these systems of discipline are spoken of with much satisfaction by those who have put them in force. Colonel Jebb thinks that 75 per cent. may be reformed. He says, "Almost the whole of the men go back to the parishes from which they came, and in a great proportion of instances they obtain employment." Captain Crofton says, "I am far from assuming that the 75 per cent. drafted into the intermediate prisons get their bread honestly, or are endeavouring to do so ; but I do know, and am prepared at any moment to prove by police and personal reference, that the great majority are getting their bread honestly, and frequently under circumstances of some considerable hardship ; and that, included in this great majority, are some of those known to the police formerly as the most reckless and daring burglars." This is a very encouraging result. Nor is its value much diminished by the knowledge that it has been obtained, not merely by the adoption of a sound system, but by the increasing active exertions of those engaged in carrying it into effect. It is true the officers employed have not only been remarkably vigilant in watching the conduct of such men under confinement, but they have also been singularly zealous in procuring employment from private persons for those who have been liberated. With less care and intelligence it may be admitted the system would not have succeeded ; but the same thing is true of the reformed administration of the poor-laws, and indeed of every department of government which is well conducted. We may surely presume that

the country will always furnish men of ability and energy competent to such a task; it must be left to our responsible rulers to make their ability and energy a title for employment. We may now look to the other part of the system—the convicts who are to be the subject of this discipline. Among them will always be found—1. young persons who have been brought up, or rather left to themselves, by vicious parents, and who, without wickedness of character, have adopted from habit a mode of life they saw prevalent around them; 2. the offspring of good parents, who, having a strong propensity to vice, have been led astray, but who, now contrite and repentant, are ready to say with the prodigal son, "Father, I have sinned before heaven, and before thee, and am no more worthy to be called thy son;" 3. criminals who are actually weary of the vicious life they have led. Virtue appears monotonous to the young profligate, but vice is often far more monotonous to the old offender. Criminal indulgence is to him no longer a temptation, and nothing but want of effort and energy to escape from confirmed habits, and begin anew, keeps many a reprobate in the ruts of his old road. It is this energy which a well-contrived course of prison discipline should supply. Indeed, the treatment of a criminal is not very different from the treatment of a patient attacked by fever. The first object is to subdue the fever; the next is by strengthening diet to raise the system again to a condition of sound health. There remains, however, a further problem. Supposing with Colonel Jebb that 75 per cent., or, with Captain Crofton, that a majority, are induced to get their living honestly, what is to be done with the irreclaimable minority? Admitting that this is a problem of great difficulty, that difficulty is much lessened when the whole body has been so sifted that the portion of husk and refuse remaining is comparatively small. Would it be too much to say in reference to persons whom the law fifty years ago condemned to the loss of their lives, that those lives should be spent in public labour, and that no period should be assigned for the remission of their punishment? This portion would, of course, consist of only the irreclaimable few; but while the punishment would reach few, the fear would extend to all. There is another portion of our convicts separated from the whole body by their age. The axiom that *malitia supplet aetatem*, though long admitted by our law, is not consistent with reason or humanity. It is ascertained that three-fourth of the criminals under seventeen years of age are the children of bad parents. It may be that the disposition of these children is, in a majority of cases, quite as good as that of those who are untainted with crime, and have never been brought before the courts of justice. Yet it is of such as these that Miss Carpenter says, in 1856, "Within three years a little boy of eight years old was solemnly sentenced, in open court, to six years penal servitude, for housebreaking! A diminutive girl of ten, and her brother, a couple of years older, were placed at the bar of their country to answer for the once capital crime of horse-stealing!" This subject has, however, for some time attracted the attention of the government and of the public. In 1834, Mr. Goulburn, then Home Secretary, designed the prison of Parkhurst as a place of deten-

tion and reformation for boys, who were to be taught, instructed in trade, or employed in agriculture, and sent to the colonies. Twenty years afterwards an act of Parliament was passed, establishing the reformatories, which the benevolence of individuals had founded, as places of legal detention for children and young persons under seventeen years of age, authorizing that detention for a period not exceeding five years, and allowing a contribution of five shillings a-week in aid of the sums collected from private sources. It cannot be denied that the principle upon which this act is founded is sound, nor can it be said that success has not attended the efforts made by the benevolence of individuals thus aided by the state. Lord Stanley, whom I name with honour and regard—addressing the National Reformatory Union at Bristol, in 1856, says, speaking of foreign as well as home reformatories—“At Mettray, 85 per cent. by one account, 89 per cent. by another, of the inmates sent out into the world are doing well. These reports are taken from the report of 1855, when 900 youths had passed through the institution. Of the 11 per cent. who had relapsed (vagrancy being reckoned as a relapse, without proof of absolute crime), one fourth, or about $2\frac{1}{2}$ per cent., had recovered their lost position. At Red-hill, where 720 boys have been discharged since the opening of the school in 1849, Mr. Turner states that 70 per cent. have been reclaimed; adding, that of all who have left there, the emigrants have done best, and that the proportion of relapses among these is lower than among those who stay at home. In the Glasgow House of Refuge, out of 400, 85 per cent. have been reclaimed.” By the acts of 1857, of which the first was passed through the House of Commons by Sir Stafford Northcote and Mr. Adderley, and the second by Sir George Grey, magistrates were empowered to commit vagrant children to industrial schools for a term of years, and counties and boroughs were enabled to grant pecuniary aid to reformatory schools. In the report of Mr. Sydney Turner, inspector of reformatories, I find it stated that the Reformatory Act has been more extensively applied in Liverpool than elsewhere, and that juvenile delinquency has in this town been effectually diminished. This result is attributed in a great degree to the exertions of the Rev. Mr. Carter, chaplain to the borough jail of Liverpool, who has been successful in calling upon the parents of criminal children to contribute their quotas. There can be no doubt that this is one of the best provisions of the act. In Scotland, by Mr. Dunlop’s act, vagrant children are removed by the magistrates to industrial schools; and it is stated that, in the town of Aberdeen especially, the absence from the streets and lanes of disorderly and neglected children is very striking. There are two observations on this subject which I wish to make before passing to a different field. The first is, that those who have charge of the reformatories ought to try various methods of awakening the moral sense, and applying the physical energies and buoyant animal spirits of the boys committed to their care. Uniformity, regularity, silence, may constrain permanently the minds of men; these methods, in the case of young boys, may be only pressing down a spring which will rebound with the more force when

that pressure is removed. I remember upon a visit which I paid to Mr. Fellenberg, at Hofwyl, that he carried me some miles into the hills to see what he called his little Robinson Crusoe. This was a large field, in which ten or twelve boys were digging and preparing the ground for seed; before this they had constructed for themselves a wooden hut, where they had their meals and their sleeping-place. These boys, indeed, were not criminals, but the task set them was a good illustration of the importance, in the eyes of their benevolent and sagacious instructor, of some occupation that shall rouse the invention at the same time that it fatigues the body. I remember also, at the juvenile prison at Parkhurst, Captain Woolcombe, the first governor of that establishment, showed me a boy upon whom he said all instruction and exhortation were thrown away until he perceived that the boy was moved by music. This faculty was cultivated and developed, and thence a way was found to soften and mould his obdurate disposition. These instances lead me to the other remark I have to make. Every one must have observed the new influences which is not being asserted or sought, but is falling to the lot of women, in swaying the destinies of the world. It is not a share in directing the patronage of ministers or guiding the councils of kings, as in former times, but a portion in the formation and the moulding of public opinion. For a great part of our periodical literature, for much of that world of fiction in which many live and nearly all take delight, we are indebted to the ethereal fancy, the delicate perception, and the grace of expression possessed by women. It seems to me, and I am confirmed in this opinion by the bright examples of heroic benevolence we have seen of late years, that if the young generation are to be an improvement upon their fathers—if sin is to have less dominion and religion more power—if vice is to be abashed and virtue to be honoured, it is to woman that we must look for such a regeneration.

With reference to measures of law amendment for Ireland, Lord John Russell thus observed:—

LAW AMENDMENT.

Lastly, in Ireland, the social and political evils which afflicted that country for a century seem to have reached a crisis in 1848. The famine of 1847 was a dispensation of Providence which the care of government could not avert, and could only partially mitigate. There have been, however, measures of social economy adopted by the legislature, the effects of which deserve impartial inquiry. One of these measures was the introduction of a poor-law, or, in other words, provision for the starving, and punishment for the professional mendicant. Another measure was the Encumbered Estates Act, introduced by the present Master of the Rolls. Both these measures naturally raised a good deal of opposition at the time of their introduction. My belief is, however, that taken together, and accompanied as they ought to be, and no doubt will be, by a strict administration of justice, as great a change for the better will take place in Ireland as took place in Scot-

land between the accession of William III. and the close of the following century. Of one thing we may be confident, that in natural talents of all kinds, whether for poetry, eloquence, and the arts of peace, or for the eventful vicissitudes of war, no people will exceed the natives of Ireland. Happy would it be if that which has hitherto been the reproach of the empire, should become her pride and glory.

His Lordship concluded his address in these words:—

It is for us to endeavour to improve the laws by which the community is governed. It is for us to show how education may be extended and diffused. It is for us to examine and record what has been done for the reformation and punishment of offenders. It is for us to confirm and animate the efforts which are being made to sustain the public health, and thereby preserve for this country her eminence as the home of a vigorous and independent race of men. It is for us to investigate the conditions of the great problems of political economy, which may often admit of exceptions, but never of refutations. In so doing, we shall but consult the welfare of the present and future generations; in so doing, we shall follow the path traced out for us by Almighty Benevolence and Almighty Wisdom.

The address of the Lord Chancellor of Ireland, president of the department of Jurisprudence, but, unfortunately, detained in Dublin, was as under:¹—

In proceeding to open the section of Jurisprudence, I have gratefully to acknowledge the honour conferred upon me by the committee, in selecting me to be the president of this, the first department of social science.

MINISTRY OF PUBLIC JUSTICE.

The place which has been assigned to jurisprudence cannot but magnify my office; it assuredly furnishes a conclusive and crowning testimony in favour of a separate and responsible department of administration for the affairs of public justice. You are aware of the address to her majesty the Queen, which, by the judicious and efficient support I received from the noble lord the President of this Association, was carried in 1857 by a unanimous resolution of the House of Commons, and to which a very favourable reply was promptly returned to the House—a reply most gracious and truly responsive; but there the movement ceased. Lord Bacon has wisely observed, that “propositions have wings, but operation and execution have leaden feet.” We must melt them, if they will not move. The same great authority has said, that “the establishing of good laws makes a whole nation to be a well-ordered college of foundation.” It is, therefore, a matter of great public consequence that our laws should be kept in harmony with the progressive spirit of this free nation; they ought to bear the impress of the age in which we live, and be truly worthy of the public justice of a wise and understanding people. The progress of a

¹It was read by Lord John Russell at the close of the proceedings, on Saturday, Oct. 16.

people in the great onward movement of humanity, might be supposed to lead to the reduction rather than to the increase of their laws; it might be expected that men would be constrained by laws written in their minds and hearts, so as to dispense with many positive commands and prohibitions. This is relatively true. But, on the other hand, the conventional arrangements of a growing civilization call for the frequent interference of authority, and in meeting the demands of new combinations of society, and in adapting the ancient laws to the growing wants of an inventive age, a great work is to be done in the department of jurisprudence—a work worthy of being well and wisely done; not, therefore, to be done at any time under sudden pressure or impulse, for then it may be ill-considered and improvident, nor ever to be done in the niggard spirit of a stingy concession, for then it may rather minister to discontent than to social improvement. It must be done generously, efficiently, and responsibly. The present chaotic condition of our laws, I must, at the outset, say is a grave reproach to so great a nation. In saying this I do not mean to suggest that we have not good laws; on the contrary, I am satisfied that we have many which are not unworthy of their connexion with that universal law so beautifully described by Hooker—"Her seat is in the bosom of God, her voice the harmony of the world."

LAW AMENDMENT.

And let me say further, and I say it with a thankful and a hopeful spirit, that in the last thirty years much, very much, has been done in the great work of law amendment; in the repeal of obsolete and apocryphal enactments; the improvement of judicial procedure, both by increasing the speed and reducing the cost of obtaining justice; in the establishment of local courts, and the awakening of public attention to the gradual improvement of our entire system of jurisprudence. Much of this has been brought about by the energy of those master spirits (I speak both of the living and the dead), not ministers, but high priests of justice; men who, in the good providence of God, have been raised up from time to time, and have imparted living power, and loftier views, and clearer intelligence to public opinion; to that which, in the end, must test and discriminate, and separate the true from the false, reject what is unsuited for immediate use, but absorb what is in keeping with the "Sensus Communis;" that nourishes the real life, and accords with the inherent laws which govern the progressive development of society. Of these master spirits one is here among us, Henry, Lord Brougham; and if I say of him in this place what I have said of him in the House of Commons, it is because this is stereotyped in the deep conviction of my heart. He has sped his eagle flight against the dazzling blaze of science, with an eye that never winks, a wing that never tires, an eye not dim, nor his natural force abated; with all the honours of his long and useful life, in which he has won so many battles in the cause of jurisprudence, we have him now, with the unabated energy of youth and the matured experience of age, helping forward the work of this great National Association.

"Præsentis tibi viventi largimur honores."

The business of this section is directly connected with the improvement of our laws—their amendment, their administration, under our judicial system, and as there are certain subjects of great practical importance which have obtained, as I may say, a right of pre-eminence, I think I may properly, and with advantage, proceed to direct your thoughtful attention to one or two of these that are peculiarly interesting to us at the present time.

ENCUMBERED ESTATES COURT.—TRANSFER OF LAND.

In the last session an Act was passed for constituting in Ireland the new court, to be called the Landed Estates Court. In the year 1849, under the auspices of our noble president, the Encumbered Estates Court was established. In 1852 the present Lord Justice of Appeal, whose practical wisdom and sound common sense may well be classed with a high order of genius, came to the conclusion that it was not only anomalous but unjust to withhold from a decretal title, in the case of a sale of land under the order of the Court of Chancery, the conclusive character which had been given to a sale under the order of the Encumbered Estates Court. A bill was subsequently introduced by the present Attorney-General for Ireland and myself to give effect to this opinion, which has had to go through the stages and seasons of seed-time, growth, ripening, and reaping; but, at last, the recent Act of the Attorney-General for Ireland—*monumentum ære perennius*—has provided “a local habitation and a name” for a court in which every owner of land in Ireland may have his title certified and made indefeasible. An admirable code of procedure for the working of this court has already been prepared, and I believe it will furnish a satisfactory solution of the difficult question which has for some time attracted public attention—viz., how to simplify the transfer of land with complete security of title, and without disturbing the settled foundations of property. This is a subject upon which we can now happily bring together the teaching of knowledge and the testimony of experience. We have thoroughly tested the working of the system now stereotyped in Ireland, and we have the valuable and elaborate report of the recent Commission for England, which was presided over by my esteemed friend and colleague Mr. Walpole, under whose watchful superintendence and by whose assiduity the report was completed. In dealing with the laws of property in a country whose social system is consecrated to order and freedom, we must proceed with cautious circumspection. It is, doubtless, an easy matter to talk vaguely on making land a commercial commodity, and dealing with broad acres as with bales of merchandise. The practical solution is quite another matter. The question was put to Lord St. Leonards when he attended as a witness before a committee of the House of Commons, of which I was the chairman. He was asked by a very zealous reformer, “Why cannot you deal with land as well as with railway shares?” “So you may,” replied his Lordship, “if you choose to ignore all the uses of land in our social system; but if these are to be preserved, the difference and the difficulty exist in the distinctive

nature and use of the things compared." In truth, the common course of society furnishes the most intelligible explanation. When industry or providence has accumulated capital, an investment in land is generally sought, not for commercial gain, but for social repose—for the position and the privileges which belong to fixed property. Land has its local limits; it is not capable of extension. Commerce is co-extensive with the wide world. Land has its system of tenancies, its various easements, its subordinate estates and interests, its encumbrances and charges, its local duties which accompany its acquired rights. Its code of laws is more or less incorporated with the delicate arrangements of family life. Is there any subject which ought to be touched with a more cautious hand? Can we then preserve the settled uses of property, and yet provide liberally for the present exigencies of society—for the wants which arise out of the changes which naturally, if not necessarily, result from the increase of commerce and the growth of manufacturing industry? Can this be done safely and satisfactorily? The Legislature has already conceded to railway companies the right to purchase land and render their title indefeasible, by lodging the purchase-money in a court of equity. The notoriety of the transaction and the supervision of the court were supposed to be a sufficient security for the rights of persons not privy to the sale. Public convenience thus required, and the Legislature thus conceded, what has been called a Parliamentary title. Again, in Ireland it became a matter of great public policy to have encumbered estates purchased by solvent proprietors, who might be expected to discharge the duties correlative with the rights of property, and therefore it was of great consequence in each case of a sale to clear the title and free the property from its charges. This led to the gradual formation of a suitable procedure, by means of which titles were subjected to a sufficient scrutiny to enable the final conveyance to be made with an indefeasible title; and this has been found to be as safe in practice as it was desirable in theory. The conveyance is simple in its form and conclusive in its essence. The actual working of the system was the subject of special inquiry before a very competent commission of learned men of both countries, and afterwards before the Select Committee of the House of Commons in 1856, by both of whom it was recommended that the principle and the procedure should be extended to the sale of unencumbered estates. One further step was needed—namely, to include the case of persons not seeking a present sale, but to whom it might be a benefit to obtain a judicial declaration of good title, which might be registered, and so made indefeasible. This step has at last been taken by the recent Act. This class of titles will be subjected to the same process of inquiry and to the same publicity as in the case of a sale; and although this was considered by some as a bold advance, yet, when it is remembered how the former Act was evaded in order to bring unencumbered properties within its operation, in order to obtain a benefit which adds about four years' purchase to the marketable price; when it must be admitted to be essentially unjust, and therefore impolitic, to depreciate to this extent property not actually in the

market, but the owners of which may at any time have occasion to sell or to mortgage, when the delay in obtaining an indefeasible title might not only be inconvenient but injurious; and as evasions by colourable sales to trustees with secret trusts would be resorted to to bring cases within the letter of the Act,—it may be now conceded that the plain, straight-forward course was the best, to include all within the plain provisions of the new law. By the imposition of a very moderate duty, regulated according to a graduated scale, a fund will be realized which, together with the investment of other moneys that would otherwise be unproductive, will render this court not only a permanent boon to the landed interest, but a benefit rather than a burden to the consolidated fund. This has grown out of a kind of bankruptcy code for landed estates, and this naturally leads to the subject which has specially occupied the attention of this section, I allude to the proposed amendment of the English bankruptcy law. It does seem to be most desirable to attain to the utmost practicable uniformity in the laws of commerce, and to begin with the attempt to assimilate the commercial law of the united kingdom. It may be that this must await the formation of a department for the affairs of justice, and for the present we must make the most of the materials at our disposal.

IRISH LAW OF BANKRUPTCY.

In bankruptcy we have a separate code in each of the three countries. I am happy to say that the new code recently constructed for Ireland works satisfactorily. In the last report of the Chamber of Commerce of the city of Dublin it is stated that the new law, “under the able and judicious administration of the court, has proved of the most important advantage to the public. Under its operation the expenses of bankruptcy have been considerably lessened, the proceedings of the court have been expedited, the power of the selfish creditor has been curtailed;” and the report adds that just provision has been made both for relieving the unfortunate and punishing the dishonest and reckless trader. There are still difficulties to be overcome in checkmating fraud and contrivance, and calling in aid the intervention of official duty where private interest cannot be brought into efficient action. But, as we must proceed upon the facts of your own actual requirements in England, and as I am rather disposed to be a listener than a lecturer on the English code, with which I am not familiar, I will reserve for the discussion to-morrow such hints as have been supplied by the very competent and esteemed judge of the Irish Bankruptcy Court, whose administration of the bankrupt law for so many years has so much contributed to its efficient working.

CODIFICATION AND AMENDMENT OF CRIMINAL LAW.

I come now to a subject in which I have for some time felt a great interest—the consolidation and amendment of our criminal law. Commission after commission has reported, select committees have inquired, a code has been digested, bills have been proposed—a succession of dissolving views before Parliament and the country. But I am bound in common justice to say, that much has thus been done in

preparing and providing, in separating and classifying, most valuable and available materials, which are now ready for the builder's use. A great work had been done by the late Sir Robert Peel in reducing to order and system the chaos of criminal law. His Acts for England were followed up by corresponding Acts for Ireland, with fewer variations; and the criminal statutes of a later period are generally imperial. It is of the very highest policy to assimilate the law of England and Ireland to the utmost practicable extent; and as the legal scavenger and the rubbish cart must be freely employed in cleansing and clearing the statute-book, for Ireland as for England, it is not too much to expect that any plan of consolidation and amendment which Parliament may adopt, and the country may sanction, will remove all the rubbish, and make use of the best materials which can be selected from the statutes of either country, in order to construct an imperial code for the common benefit of both. In thus dealing at this time with the reconstruction of the code of criminal law, we may test the practicability of further assimilation. It may become a question for Parliament to decide, by resolution or otherwise, authoritatively, in what form the work should be done to render it finally acceptable. Some earnestly contend for repeating in the new law the very words of the old enactments, with all the jargon of the Old Bailey. Others more rationally suggest that a new code should be framed, in the most exact but plain language—what was doubtful should be made clear, what was defective should be supplied; and for this purpose we should turn to account authentic judicial decisions. In a word, that we should avail ourselves of all the light and all the information within our power to command, and use our best efforts to make the law consistent with the present state of opinion, and to have it expressed with grammatical accuracy, and as a model for the consolidation and amendment of the entire of our statute law. I must say I am entirely of this opinion, and am prepared to defend and to enforce it whenever called upon to do so. It is high time to be delivered from the bondage of such mischievous, because unjust, classification of crime as felony and misdemeanour, and all the kindred verbiages. Why should we have the most important differences in the procedure for the trial of a felony, which is in substance a misdemeanour, and of a misdemeanour, which is in substance a felony, if by these terms we designate the essence of the crime? And if we do not, why is the obsolete and unjust distinction to be perpetuated? Instead of these let us have a sound and rational classification of punishments; and here we are required to make up our minds upon a very solemn question, which now awaits decision—whether we are to return on the statute book, as a punishment of any crime under the degree of treason, by which human life is not murderously taken away—whether we are to continue in this class of cases the punishment of death? I cannot touch upon this topic without a feeling of deep thankfulness to God, that so much of our law that was once written in blood, is in the course of being gradually replaced by a humane reformatory system. There is, perhaps, no point of comparison between the past and the present, more interesting to those who mark with gladness the pro-

gress of society, than the change in the moral sense—the public conscience—in reference to the punishment of death. The sacredness of human life is of the essence of religious truth. The unnecessary retention of the punishment of death in any one class of crime is not only a foul stain upon the statute-book, it is constructively, at least, a capital offence in the Legislature itself. There may be—I believe there is a voice within—which in the case of a clear conviction for wilful murder ratifies the sentence of the law, and recognizes expiation in the capital punishment. But where life has not been taken—where the intent has been frustrated by providential interference—it is an intimation to us that human justice is to be so far moderated by an overruling Providence, and we should follow the merciful suggestion. I believe that such a view, if adopted in our land, would be consistent with the profound convictions of the wisest and best of our people, conducive to public morality, and expressive of the attainment of another stage in the march of civilization. If, then, this question of classifying punishment were decided, and the appropriate class allocated to each specified crime, and if the work of consolidation and amendment would embody the conclusions of Parliament on the classification of crime and punishment, and the new law be framed after the manner I have already suggested—I do not believe that the apprehension would be realized, which some entertain, that the controversy on the new phraseology would in effect defeat the project. I think this is a libel on the Legislature, and I would add, that if this limited project could not be thus completed, I would altogether despair of any general assimilation of the law of England and Ireland, and of any amendment of the statute law of either country that would satisfy public expectation, or be in any sense worthy of the occasion. But I am not disposed to take a desponding view of a work which has become national.

CHANCERY PROCEDURE.

We have had, of late years, a very great improvement wisely, though tardily, effected in the procedure of the superior courts of law and equity. It is, doubtless, easier and safer to remodel the remedies which a system of laws admits, than to interfere with the rights which it confers. This species of reform comes into speedy and general operation without disturbance or confusion. It is about fifteen years ago, when I was engaged in arguing a case at the bar of the House of Lords, and in speaking of a decision of the very eminent lawyer then Lord Chancellor of Ireland, I said it was made in the hurry of the Court of Chancery. Lord Brougham replied, "We never talk of the speed of a broad-wheeled waggon." At present, how great is the change which has been wrought? Properties which, under the old system, must have been devoured by the delay and the expense of a cumbrous, stalled system, may now be administered without any unreasonable delay, and at a moderate cost. And it is well that this most beneficial change has been set on foot. It is not as yet matured as I could wish it to be; for I confess I heartily desire to see the High Court of Chancery worthy of being regarded as the inner shrine of the sacred temple of

public justice, and not the byword for costly, vexatious, and ruinous litigation. The blind idolatry of technical procedure, the false worship of our superior courts, roused that impatient and indignant zeal which smashed the ancient tables of the law; but this has ended in the destruction of the idols, and the renovation of our judicial system. We are at present dealing in each country with an improved but distinct system of procedure. That such a distinction should be permanent, cannot be rationally contended. I look forward, therefore, with hope that, at an early day, we may frankly compare notes, and construct one system, in which we may thenceforward have a common interest, and which, I trust, may soon be watched over by a department common to both countries. Much has been done, much is under consideration, but the work is great, and we must not expect to be able to sow with the one hand and reap with the other. There is one department which, of itself, might well claim the undivided attention of the most diligent and thoughtful—I mean the lunacy and minor department of the Court of Chancery. Whether any man should be allowed to have a private asylum for making money by the custody and maintenance of lunatics, where, generally speaking, his interest is not on the side of duty; where the continuance, not the cure, of the afflicted and helpless being under his charge, is for his pecuniary profit; where inspection cannot sufficiently secure the parental care which the state owes to those who cannot be intrusted with their personal liberty; where the withdrawal of a licence may rebuke the offender, but cannot provide a remedy for the unhappy victims of the offence; whether it is not the responsible duty of the state to interpose its authority where private interest is not only inefficient, but adverse; and whether in every case where personal liberty is interfered with, there should not be the means for promptly bringing the matter under the notice of responsible authority, and making adequate provision for the future custody and treatment (if necessary) in a public institution. These are grave questions—well worthy of the deliberate attention of this Association.

LEGAL EDUCATION.

There is another subject vitally connected with all that we can hope for in the improvement of our jurisprudence, and that is the subject of legal education. Improved procedure—amended laws—much to be valued though they be, yet if we do not secure the moral elevation, the trained capacity, and the love of justice in those who are to administer these laws, we deprive them of their living power, and they take no root in the respect and the affections of the people. Why, may I ask—why should not the profession of the law be dealt with as other professions? Why should not the proper qualification be required, and the suitable education made compulsory, in order to obtain the status of a barrister? And, when obtained, why should preferments be set apart for the barristers of six years' standing, or any longer period of more seasoned incompetence? Some years since it was said, in the presence of a lord-lieutenant of Ireland, that "there

was neither honour nor honesty to be found in the country." An old sagacious physician who was in the room observed that that was going a little too far. "Perhaps," said he, "there is no great market for the articles; for surely supply will soon meet demand." In the several inquiries on education, military, medical, and the commission on the Inns of Court, there will be found a concurrent testimony in favour of laying the foundation of a good liberal education before the work of special instruction should begin. This instruction is not education, and without education it is but handicraft. I must not be tempted to poach on the manor of Mr. Cowper; but I know he will not object to my recording the heartfelt pleasure with which I paid the testimony—that it is our interest not less than our duty to educate a man for his own sake as a moral, intelligent, accountable, and immortal being; and the more careful this training and teaching, the more complete this education, the more certain the success of special and subsequent instruction. If, then, the progress of education would be ascertained by periodic tests; if university degrees were made a plain reality, and not a pompous fiction; if the Inns of Court would (as I have reason to believe they will) secure the required qualification before they admit to practise; and if the policy of the public service were such as to encourage and reward merit, doing justice to those who devote themselves to the administration of justice, then might we reasonably expect to have men worthy of that profession which has given to the country its Hale and its Somers, with Holt and Mansfield, with Bushe and Plunkett, these lights of other days, illustrious men who have left behind them a track of glory which has not ceased to shed its lustre on the profession which nurtured their genius and their virtues. The country is deeply interested in surrounding the profession with all the security which can be afforded by liberal education and enlightened policy. On the moral results may much depend the pure, dignified, and impartial administration of justice, and with this are bound up the order, the freedom, and the maintenance of civil society.

CONCLUDING REMARKS AS TO THE ADMINISTRATION OF JUSTICE.

It is not, then, without reason that jurisprudence has been placed at the head of the sections of this Association. Why should it not also have a separate and principal department of administration? How otherwise can we collect, and record, and make timely use of the practical suggestions which come from those who are engaged in working the laws? How can we bring public opinion steadily to bear in judicial procedure, without regular judicial statistics? How is our code of judicial decisions to be maintained as part of a binding system of law, if these decisions be not authenticated, reported by responsible officers, and published under responsible authority? The suit between A. B. and C. D. involves a decision in which the public is a party deeply interested. But there is no public provision made for an authentic report of such a decision, or that it should be dealt with otherwise than as the private litigant, the casual, perhaps incompetent reporter, or the speculating publisher, may secure. If there were a

Department of Council with the Chancellor at its head, and under this a secretary of the affairs of justice, with a seat in the House of Commons, and a staff sufficient to enable this department to supervise the administration of public justice in the united kingdom, with a view to the amendment of the law, and the exigencies of public justice, there would be, to use the words of the late Lord Langdale, a very busy and most valuable department. And, if the Legislature might require the occasional assistance of such a department in aid of current legislation, it might be given without in any degree interfering with the constitutional freedom and accustomed privilege of any member of either House of Parliament. Nor is there a session in which examples of imperfect or erroneous enactments could not be found to prove the need of some such protector of the public, who suffer frequent injustice under the present system. I am not disposed to indulge in any visionary expectation of a perfect system of laws, or that we can by any contrivance secure absolute purity of administration. "Human institutions," says South, "cannot wholly be constructed on principles of science, which is proper to immutable objects. In the government of the visible world, the supreme Wisdom itself submits to be the author of the better, not of the best, but of the best possible in the subsistory relations. Much more must all human legislators give way to many evils rather than encourage the discontent that would lead to worse remedies." But the use of timely remedies is a standing duty. The continued neglect of functional irregularity leads to chronic disease and organic disorder. All analogy and all experience, from the pruning of the tree to the repair of the building, teach us that the conservative spirit is necessarily remedial, and that the demands of time cannot safely be postponed. "Time," says Sir Matthew Hale, "is the wisest thing under heaven. He that thinks that a State can be exactly steered by the same laws in every kind as it was 200 or 300 years since, may as well imagine that the clothes that fitted him when he was a child, should serve him when he was grown up as a man. The matter changeth the custom, the contracts, the commerce; the dispositions, education, and tempers of men and societies change in a long tract of times; and so must their laws in some measure be changed, or they will not be useful for their state and condition." The living law must not be left to perish in the arms of the dead. Law is a rule of present obligation, and the statute-book should therefore be cleared of all that is not now proper to bind the free citizens of this generation. Some laws have been but the scaffolding of our social system; the removal of such cannot weaken the foundation, or shake the superstructure. Others have lost the sanction of public opinion, and a law which cannot be enforced without offending public feeling, ought not to be retained. Again, there are laws which are now happily surpassed by the improved intelligence and moral convictions of society; laws which may, perhaps, have aggravated the evils which they were called on to remove, for these could only yield to higher influences. Moral evils properly require moral remedies. Thus is there a great work of reconstruction, in which we are called upon to

proceed as wise master-builders, with the caution of men who profess to honour jurisprudence as the chief department of social science. Ignorance or empiricism with rude or unskilled hand, might level in an hour the work of a century; but we seek for sound experience, the test of free discussion, the approval of practical wisdom. It is in this spirit, thus led by the hand, with an honest desire of keeping pace with the progress of enlightened opinion, that I have advocated, and still advise, the formation of a department of jurisprudence, like that of education.

"Learn to be just, just through impartial law,
Far as ye may, erect and equalize;
And what ye cannot reach by statutes, draw
Each from his fountain of self-sacrifice."

This is the work of social science, a work eminently Christian. The Divine founder of our pure and practical religion, the greatest yet the lowliest of beings, was the gentlest and the kindest and the best, and they who would follow Him need not turn from the path which leads to the social welfare of others, nor reject the agencies which we here seek to invigorate and improve. This co-operation in duty may help to soften the severity, to subdue the pride of opinion, and nourish the spirit which should ever urge us to love our neighbour as ourself. In this season of prosperity, in this time of peace, how thankful am I to have the privilege of uniting with the elevated peer, the enlightened commoner, the sagacious statesman, and the thoughtful scholar, upon common ground for the common weal, under the blessing of God, publicly and solemnly invoked. The future of England, which Niebuhr rather supposed than predicted, was this—no longer to try to domineer over the continent of Europe, but to busy herself with the nobler work of social reformation. One of her own great poets has assigned to her the lofty mission to teach the nations how to live. Another—the purest, most thoughtful and tender-hearted—has recorded the triumphs of her social industry in words which are associated with all that surrounds us in this great community:—

"At social industry's command
How quick, how vast an increase! From the germ
Of some poor hamlet, rapidly produced,
Here a huge town continuous and compact,
Hiding the face of earth for leagues.

Hence is the wide sea peopled: hence the shores
Of Britain are resorted to by ships
Freighted from every climate of the world
With the world's choicest produce. Hence that sum
Of keels that rest within her crowded ports,
Or ride at anchor in her sounds and bays;
That animating spectacle of sails,
That through her inland regions to and fro
Pass with the respirations of the tide
Perpetual, multitudinous! Finally,
Hence a dread arm of floating power—a voice
Of thunder, daunting those who would approach
With hostile purposes the blessed Isle;
Truth's consecrated residence—the seat
Impregnable of Liberty and Peace."

The following is a list of the Papers read, in the Section of Jurisprudence, at the Meeting :—

1. Report of the Special Committee on Bankruptcy and Insolvency.

2. Professional Remuneration, by Andrew Edgar.

3. Legal Education, by Herbert Broom.

4. The Law of Savings Banks, by E. T. Wakefield.

5. Commercial Tribunals, by E. T. Heath.

6. Consolidation of Local Courts, by G. W. Hastings.

7. The Law relating to Foreign Debtors, by J. T. Danson.

8. Equitable Jurisdiction in County Courts, by John Smale.

9. Scotch Sheriff Courts, by J. D. Milne.

10. Requisites of a Ministry of Justice, by Arthur Symonds.

11. The Statutes, by Mr. Serjeant Woolrych.

12. The Reformation of the Statutes, by F. T. Sargeant.

13. Expediency of facilitating the Sale and Transfer of Land, by John Lake.

14. Transfer of Land, by E. T. Wakefield.

15. The Law of Patents for Inventions, by R. A. Macfie.

16. The Payment of Common and Petty Juries, by William Merry.

17. Observations on the Law affecting Gifts *inter vivos*, by Edmund Webster.

18. The Law of Infanticide, by W. B. Ryan.

19. On the Reformation of the Administration of the Law by Justices of the Peace.

20. On the Office and Court of Coroner.

21. On the Registration of Private Partnerships, by Mr. Bousfield.

Such were the Papers read in the department of Jurisprudence alone, at the recent Free Conference. The catalogue by no means indicates the number, variety, and practical importance of the topics and suggestions which they contained. They touched upon almost every point of the field of law, and afforded another manifestation of the necessity of establishing an office, or officer of state, to consider matters of jurisprudence and law amendment ; for undoubtedly a large portion of the matters submitted to the Association on this occasion were deserving of very grave and earnest attention, and of practical realization too.

Such was the programme, but its order was somewhat changed in the course of business to meet the exigencies of the department, and also of some of the professional gentlemen who were compelled to leave earlier.

The department of Jurisprudence, and the amendment of the law, did not meet till Wednesday morning, the previous day having been occupied by the reading of the addresses of the Presidents of Departments before the Association at large.

On Wednesday (Lord Brougham being in the chair, owing to the absence of the Lord Chancellor of Ireland) the report of the committee on bankruptcy and insolvency was discussed.

After Mr. Hastings had made the report, it was moved by him, and seconded by Mr. Heath—

“That, in the opinion of this department, any measures for the amendment of the bankrupt law ought to proceed for the following reforms :—

1. The transfer of the compensations and salaries now charged on the estates under adjudication to the consolidation fund.
2. A diminution of the entire cost, by a reform of the mode of administering justice therein.
3. A consolidation of the statute law, relating to bankruptcy and insolvency, under a single jurisdiction; the abolition of the distinction in the administration of the estates of insolvent traders and non-traders; and the winding up in bankruptcy of the estates of deceased insolvents.
4. To give all due facility to voluntary settlements, providing for their registration in court.
5. To facilitate the proceedings in court, as far as possible, to those of a settlement out of court.
6. To provide greater local facilities for the administration of justice in bankruptcy.

The resolution was supported by Mr. Rayner of the Huddersfield Chamber of Commerce, Mr. Mowatt of the Birmingham Chamber of Commerce, Mr. Whitwell of the Bristol Chamber of Commerce, Mr. Lupton of the Leeds Chamber of Commerce, Mr. Darlington of the Bradford Chamber of Commerce, Mr. Arthur Ryland of Birmingham, Mr. Jowitt of Leeds, Mr. Lillyman, President of the Liverpool Guardian Society, Mr. Bissington, and Mr. Morgan.

The resolution was then put from the chair, and carried unanimously:—

It was moved by Mr. Hastings, seconded by Mr. Lupton, and resolved unanimously:—

That, in the opinion of this department, the Bankruptcy and Liquidation Bill, introduced into the House of Lords by the Lord Chancellor, at the close of the last session, fails to meet the last-mentioned requirements.

It was moved by Mr. Hastings, seconded by Mr. Denning of Birmingham, and resolved unanimously:—

That this department approves of the Bankruptcy and Insolvency Bill prepared by the special committee appointed by the Association at its last annual meeting, and introduced into the House of Commons by Lord John Russell, and recommends the Association to endeavour to obtain its enactment into law, with any modifications and improvements that may be found desirable.

It was moved by Mr. Hastings, seconded by Mr. Jowitt, and resolved unanimously:—

That this department recommends a general committee on mercantile legislation, constituted similarly to the special committee in bankruptcy and insolvency of last year.

MR. EDGAR read his paper on professional remuneration.

MR. DANSON stated the opinion of the merchants of Liverpool on the subject, which he considered to be unfavourable at present to any change in the method of remunerating attorneys and solicitors, so as to substitute a system of special contracts for the fixed mode of charge now in use. They felt that it was altogether beyond their competence to determine, on each occasion, the fair rate of charge, and they would not be in a condition to stipulate, as they were in the case of commodities, the value of which was generally known through open competition and other means.

The CHAIRMAN stated, that on his recommendation Mr. Broom would postpone his paper on legal education until the next day, when it was hoped that the Lord Chancellor of Ireland, who had paid very special attention to that subject, would be present.

It was arranged that Dr. William Burke Ryan should read his paper on infanticide, he being compelled to leave on the morrow.

DR. RYAN then read his paper on the law, prevalence, and

prevention of infanticide, remarking on the great increase of that crime, owing to the judges being obliged to declare the law to be that the child must be entirely born, to bring the case within the offence. He concluded with the following suggestions :—

1st, That, in cases of infanticide, proof that the child has been wholly born be no longer required, but that in all cases it be sufficient to prove that the child met its death by violence.

2nd, That, as in the French law, the jury may find upon the capital charge, “with extenuating circumstances,” and that punishment according to the *nature of the circumstances attending the crime* be justly meted out.

3rd, That, in order to enable the mother of an illegitimate child to free herself for future exertions, the putative father be obliged, according to his circumstances, to pay such a sum as will enable the woman to put the child out to nurse, and that this sum vary, from the present amount as a minimum to seven and sixpence per week, according as circumstances of aggravation, which the law may not otherwise be able to meet on behalf of the woman, may appear.

DR. INMAN spoke in support of the views of Dr. Ryan.

MR. E. T. WAKEFIELD read a portion of his paper on savings banks, the conclusion of which, and the discussion thereon, was postponed to the following day.

On Thursday (the 14th Oct.) the business of this department was resumed, by the reading of a paper by MR. BOUSFIELD of Leeds on the registration of partnerships.

A discussion ensued, in which Mr. Edgar, Mr. Reay, Mr. Slaney, Mr. Edmund Potter of Manchester, Mr. Cookson, Mr. Lupton, President of the Leeds Chamber of Commerce, Mr. Bissington of Leeds, Mr. R. A. M’Fie, Mr. Bushell, Mr. Hastings, Mr. Bousfield, Mr. E. T. Wakefield, Mr. Danson, Mr. Squarey, and other gentlemen took part. Eventually it was moved by Mr. D. Lupton, and seconded by Mr. Whitwell :—That, in the opinion of this department, a system of general registration of all private partnerships is imperatively called for, and that the consideration of the details be referred to the special committee on mercantile legislation.

The resolution being put, was carried—

For the resolution	24
Against	3
Majority	21

Lord Brougham, having to read a paper in another department, vacated the chair, which was taken by Christopher Bushell, Esq.

Mr. E. T. WAKEFIELD resumed the reading of his paper on savings banks, commenced on the previous day. He suggested that it is expedient that the depositors in savings banks should obtain the security of government, if this can be conferred with a just and prudent regard for the interests of all classes; and that the security of the government shall be given only on the condition of the government being invested with adequate powers of oversight and control.

That the successful administration of these institutions, their orderly conduct, and immunity from fraud, depends upon a short system of management, a rigid observance of numerous rules and minute details.

That it is impracticable either to enforce the short observance of these rules, or to enable the government to assure itself, than by some system of free and immediate inspection, which can only be effected by officers exclusively devoted to the business of inspection, and the servants of, and responsible to, government alone.

That all savings banks that will elect to put themselves under the operation of the proposed measure, should be entitled to give to their depositors perfect government security for the repayment of their deposits.

That all such banks should be at liberty to assume exclusively the title of government security savings banks.

That, in return for the liability thus assumed, government should exercise a power of inspection and control over the banks obtaining government security.

That this system of inspection and control should be carried out by a staff of inspectors (assisted by competent accountants),

paid by and exclusively under the control of the government, of whom Mr. Wakefield thought three or four would be sufficient for England and Wales.

That the inspectors should be invested with ample powers to enforce a strict observance of the rules and regulations for the management of the banks, and be charged with the following duties:—

1. To frame a system of rules and regulations for the uniform administration of the banks.

2. To visit the banks from time to time, and see that these rules were duly observed, and that the officers of the banks strictly discharged their respective functions.

3. To decide upon the best system of accounts and book-keeping, and to see that the books were kept according to the prescribed system, with a periodical balancing of accounts, having always the signatures of the proper officers, that the balances were regularly paid over to the treasurer, and also the best mode of dealing with dormant accounts was adopted.

4. To prescribe in each case the balance to be kept for carrying on the business of the bank.

5. To see that all banks granted annuities, in accordance with a table prepared by the inspectors.

6. To fix the amount, and to approve of the securities required to be given by the officers of the banks.

7. To see that the bank offices afforded suitable accommodation, proportionate to the amount of the business transacted by each bank.

8. To examine the legal titles of the bank buildings, particularly of those requiring outlay.

9. To decide upon the most convenient plan for bank offices; and when it is proposed to erect new ones, in all cases where practicable, that they should be so constructed as to give the depositor a separate department for transacting his business.

That the inspectors should have the power of summoning a committee, composed of their own members and experienced officers of influential saving banks, to aid them in preparing, and, when necessary, modifying the proposed rules; and, in order to secure uniformity of management, that the majority of inspectors

should have the power in framing these rules to bind the minority.

MR. WAKEFIELD made other important suggestions, and concluded by suggesting that any measure of legislative reform would be highly defective, which would not codify the entire statute law upon this subject, by repealing all previous enactments, and re-embodying their provisions with the new measures in one act.

A discussion followed, in which Mr. Slaney, M.P., Mr. W. S. Cookson, Mr. Reay, Mr. E. Heath, Mr. Smale, Mr. Eden, Mr. Wakefield, and the chairman, took part.

The CHAIRMAN recommended that the funds of the savings banks should be invested in erecting buildings for the poor, which would yield a higher per centage than the government investment, and at the same time materially improve the condition of their class.

On the suggestion of Mr. Reay and Mr. Heath, Mr. Slaney was requested to hand in, for the use of the Association, a paper prepared by him on the subject of investments for the middle classes.

MR. DARLINGTON read a paper on the legalization of chambers of commerce.

MR. HEATH read a paper on the "necessity which exists for the institution of local and permanent civil courts for the adjudication of commercial disputes," in which he enlarged on the incompetency and the inadequacy of the existing courts for dealing with special matters, such as of a commercial nature, and pointed out how, by the combination of the legal and the special elements in tribunals, with the condition that they should be local and permanent, the true objects of a tribunal might be realized to the people.

MR. BUSHELL being compelled, during the reading of Mr. Heath's paper, to vacate the chair, Mr. W. S. Cookson was called upon to preside during his absence.

MR. G. W. HASTINGS delivered an address upon the consolidation of local courts, which excited great attention. He observed that the want of local courts of plenary jurisdiction was quite of modern date; for that some centuries ago all the

principal towns in the kingdom, more especially the mercantile towns, had been supplied by the wisdom of our ancestors with local courts possessing such powers. These courts had gradually fallen into desuetude, because their judges, the recorders, had ceased to be resident, and because they possessed no power of enforcing their judgments beyond the boundaries of their respective boroughs—a defect which had not been felt when trade was concentrated, and communication difficult between different parts of the country, but which was fatal in modern days, when contracts were made by mercantile men over the whole kingdom. After alluding to the almost entire disuse of these ancient local courts, Mr. Hastings proceeded to describe the parliamentary history of recent county court legislation, and did full justice to the unwearied efforts of Lord Brougham in this direction during the last thirty years. His lordship, he said, had, in 1830, introduced a bill to establish local courts, with a compulsory jurisdiction up to £100, and with a voluntary jurisdiction to any amount. These courts were also intended to be courts of reconciliation and arbitration. This great and comprehensive measure was defeated; and a subsequent bill, with somewhat similar provisions, introduced into the House of Lords a year or two after, was also lost, though by a very narrow majority—and several subsequent measures shared the same fate. After alluding to the introduction of the first county court bill by Lord Lyndhurst, who had actually opposed Lord Brougham's measures, but afterwards came round to his views, Mr. Hastings went on to state his plan for the better administration of local justice. He proposed that, in each of our large towns, a borough court should be established, by uniting together the present bankruptcy and county courts, the recorder's court, and any other local tribunal existing in the town; that the recorder should be chief judge, assisted by one or two deputies, who should all be compelled to reside in the locality, and be paid such salaries as would make their posts objects of ambition to lawyers of the first class. He showed by figures that the salaries now paid to different judicial officers in our large towns, were sufficient to defray the expenses of such a court as he proposed; and he concluded by describing the operation of the lord mayor's court in London, which had

precisely the same origin as the ancient courts in other places, which, like them, fell at one time into disuse, and which had recently been so improved by an act of parliament as to form a most valuable local tribunal for the citizens of London.

LORD JOHN RUSSELL expressed his approval of the suggestions made by Mr. Hastings, and asked him if he was prepared to bring forward a resolution upon the subject.

Mr. HASTINGS replied, that he was averse to any resolution without the most mature consideration, and the matter was postponed for further discussion.

MR. HASTINGS read a paper by Mr. Bickerton Evans, "on a practical defect in county court jurisdiction."

MR. SMALE read a paper on the equitable jurisdiction in county courts, in which he recommended as a tentative process, that the equitable jurisdiction should be extended to the county courts at Liverpool, where there already exists a court of equity in the Court of Chancery of the county palatine of Lancaster. He did not approve of the extension at present to the other county courts, many of the judges of which had had neither education nor experience in the administration of the system of equity which obtains in this country.

MR. EDGAR read a paper on the Scotch sheriff courts by J. D. Milne, in which that gentleman pointed out the nature and scope of the jurisdiction of the sheriff's court jurisdiction in Scotland, and the manner of its working. Some dissent was expressed, on the part of a Scotchman present, to the claim of merit put in for these courts, especially as regards the appeal from the sheriff-substitute of the county to the sheriff-depute in Edinburgh, which is done by means of written documents without hearing the parties.

A discussion on the papers on local justice took place, in which Mr. M'Laren of Edinburgh, Mr. Edgar, Mr. Mitchell, Mr. Danson, and Mr. Whitwell of Bristol, took part.

Mr. Whitwell proposed, and Mr. Brown, mayor of Bradford, seconded—

That, in the opinion of the department, the incorporation of

chambers of commerce is desirable. On a show of hands, the resolution was carried by a majority of one.

MR. DANSON read his paper on the law relating to foreign debtors.

Mr. Danson moved, and Mr. Squarey seconded—

That it is desirable that a law be enacted, embodying the principle of the Scottish law of arrestment, and made applicable to the whole of the united kingdom ; and that, as touching the best method of carrying this resolution into effect, the subject be referred to the Mercantile Law Committee appointed by the department.

On Friday morning LORD JOHN RUSSELL took the chair.

MR. ARTHUR SYMONDS read a paper on the legislative arrangements of a ministry of justice, in which he sketched out a comprehensive plan for the ascertainment, collection, registration, and consolidation of our laws, and for their periodical promulgation in a uniform shape. He also advocated the formation of a public office with a thoroughly organized staff, from which the public might obtain the benefit of an authentic enunciation of what the law is as affecting the different classes of the community. The paper was illustrated by diagrams and tables, giving a sketch of a proposed state register, by means of which the law, either in its present or future state, may be progressively recorded, and the proposed form of a Victoria code.

MR. SYMONDS stated, in opening, that this paper was in some sort a continuation of the paper he read at the meeting of the Association at Birmingham last year, on the recordation of the law for the purposes of promulgation, administration, and legislation, wherein he had set forth the principles to be regarded ; and that the present paper showed how, in the requisite arrangements of a ministry of justice, these principles might be realized.

He deprecated the establishment of a single office too strong or too weak, and proposed that the principal departments of government, including therein a ministry of justice, in the form of a Committee of Privy Council, should be revived, by the appointment of legislative counsel, which with a bare exception they were without, who should execute the revision of government

bills before they were introduced into parliament, and that the parliamentary officers, under the presidency of the clerk of the parliament, who is *custos* of the statutes, should fulfil that function with regard to pending legislation, and should duly register and index the statutes, and submit the results annually to parliament.

He proposed that a body similar to the Statute Law Commission, but reinforced in many important particulars, should be charged with the duty of bringing the law into a proper state for the regular periodical action recommended in the other parts of his plan.

These matters were exhibited in detail, as to the organization of the officers, the processes to be adopted, and the considerations to be regarded in the connected operations.

And the state register, or Victoria code, was shewn in full outline, with intimations of the minor details of the instruments of legislation, whether single statute or code.

MR. EDGAR stated that a paper had been received from Mr. Serjeant Woolrych, who was not able to be present; but he was obliged to say that he could not read the cramped character in which it was written, and, therefore, he very reluctantly withdrew it for the present.

This paper, which we have seen, is certainly difficult to read, impossible to one who is not accustomed to the handwriting. We have seen it, and regret that the meeting could not have the benefit of the suggestions of the learned Serjeant, who has given so much attention to the subject. It contained some valuable matter, to which we hope to refer when we come next to consider the subject.

MR. T. SARGEANT followed Mr. Symonds with a paper on the reformation of the statutes. He proposed a commission, consisting of three lawyers—an equity man, a conveyancer, and a common lawyer. He referred to the singular success of Mr. Brodie's Act on Fines and Recoveries, as a proof that good legislation might be obtained by the adoption of appropriate means, rightly applied in the selection of fit persons, adequately paid.

MR. EDGAR stated he had received a paper from Mr. Edward Webster on gifts *inter vivos*, some portion of which, relating to decisions of the Court of Chancery, he feared were of too technical

a character to be read at length ; other portions, bearing on the subject of consolidation of the decisions of the Court of Chancery, and so having a connection with the papers read on this occasion, he proceeded to lay before the meeting.

In this able paper MR. WEBSTER instanced a great number of conflicting and apparently conflicting decisions, ranging over a long period of time, from which, by simple collation of the matters, might have been deduced a certain rule. We hope to return to this subject on a future occasion, as an exemplification of the manner in which the codification, or the reduction of our unwritten law, as it is called, into systematic and connected form, might be realized.

A discussion ensued, in which Mr. William Taylor, Mr. Hadfield, M.P., Mr. M'Laren from Edinburgh, Mr. Hastings, and Mr. Symonds, took part.

LORD JOHN RUSSELL stated his views on the subject. The work, he thought, should be intrusted to a few gentlemen, who should not merely consolidate but amend.

The mode of passing bills through parliament required consideration ; and he thought that we should not be above imitating a course which had been adopted in New York. He referred to the revision of statutes there, for which the legislature had a special session. Something of the same kind must be done with us. The subject cannot be satisfactorily dealt with in the midst of political subjects. Lord John Russell would not then, in the absence of the Lord Chancellor of Ireland, who had given so much attention to the subject, go into the question of the ministry of justice, but confine himself at that time to that part of the matter which related to the consolidation of our statute law. He had never expected much good from the Statute Law Commission, composed of men whose time was otherwise occupied, and whose attendance was otherwise irregular. What was wanted was a small body of well-qualified persons who would give continuous time and labour to the work, and who would act in unison with each other.

Mr. HASTINGS pointed out a striking instance of the way in which bills were now passed through parliament. During the Russian war it became necessary to raise the customs duties, and a bill was introduced repealing the Customs Consolidation

Act, and substituting a fresh schedule of duties. In the committee the schedule was reduced to an enumeration of the few duties which it was intended to raise, but it was forgotten to strike out the general repealing clause, so that the act absolutely abolished all duties except the few in the schedule, and placed millions of the national revenue in jeopardy. Mr. Hastings added, that when the statute law and the common law decisions were carefully consolidated, but not until then, a code similar to those of Rome and France might be framed.

MR. W. A. JEVOUS said, that direction should be given that the statute law alone should be consolidated in the first instance, on the necessity for which all were unanimous, while considerable difference of opinion existed as to consolidating the common law decisions.

The following resolution was then moved by Mr. W. Taylor, seconded by Mr. Sargeant, and carried *nem. con.* :—

That it is the unanimous opinion of this department, that a complete revision of the statutes is absolutely necessary, and that it should be the first duty of the legislature to consolidate the laws of the country into an intelligible and comprehensive form; and that it is the further opinion of the department, that this would be best effected by the appointment of a permanent commission, with an efficient staff of officers.

MR. HERBERT BROOM read a paper on legal education, in which he pointed out how, by cautious and certain steps, we might advance in the course of special legal education and legal training for the profession, and at the same time afford opportunity for the public acquiring some knowledge of the law, which by the theory of our constitution every body is bound to know.

“Holding, as I do,” remarked the reader, “that no sweeping or violent reform is needful for working out a sound and effective system of legal education, I will conclude this paper with presenting for acceptance a general proposition. As in the continental law schools, so in our own the principles of legal science should alone, or almost exclusively, be taught. Principles may be learnt in the lecture room—the details of practice must be gathered in our courts of justice. Jurisprudence is to be taught as one connected whole, not in disjected fragments, but

so that the relation of each of its departments to the rest may be appreciated and understood. It should be studied before the attempt is made at reducing it into practice—not afterwards. When this is effected, and not till then, will a sound system of legal education have been inculcated amongst us. The stigma will be wiped away that here, in the foremost country of the world, such a thing is neither taught nor recognized as the *philosophy of law*."

MR. H. BROOM submitted, that although any one of the suggestions which he had offered, when taken singly, might seem inadequate for effecting the object which he had in view, viz, the improvement and more vigorous carrying out of a system of education for the bar, this would not be so were they adopted and acted upon jointly. They might be enumerated thus :—

That at institutions where jurisprudence or any branch of that science is professedly taught, the instruction given should be designed as preliminary and ancillary to that which will afterwards be had in our Inns of Court, should the recipient proceed thither. Exactly (by way of illustration) as the classical or mathematical curriculum of education at a public school, or at a private tutor's, is for the most part such as will qualify the student, when he has entered himself at one of our universities, for distinguishing himself there.

In the next place, that the lectures at our Inns of Court should, under fitting regulations, be thrown open generally to the public. By no means anticipating that many would avail themselves of the privilege of *entrée* thus conceded, yet thinking that good would nevertheless be done, in enabling such as may purpose embarking in an enterprise so onerous and perilous as the prosecution of the profession of the law, first to ascertain their own aptitudes for that which they propose to do, or of discovering and becoming conscious, ere it be too late, of their own inaptitudes, to avoid the frightful consequences of failure.

Then, in the next place, he urged the importance of institutions, and bringing stringently into action a scheme of compulsory examination for the bar.

And lastly, he suggested that law ought to be taught (and more uniformly perhaps than has yet been done) in like manner

as other sciences are taught, by inculcating *principles*, by showing the connection of each of its leading branches with the rest ; and thus, it may be hoped, laying the foundation of sound professional knowledge, which nothing could afterwards disturb.

LORD JOHN RUSSELL being compelled to leave, the chair was taken by Mr. Cookson.

MR. SYMONDS spoke in support of Mr. Broom's views, and urged the importance of a consolidation of the law as a basis of legal education, and as a means of maintaining a consolidation after it had once been made. He contended that consolidation and codification alone, the mere embodiment of law in written instruments, though valuable as a means of reference, and as a supplement to the tradition of law by the practitioners in all its branches, could not take the place of such tradition. It would want the principle of vitality, by which law is made a living thing ; but the profession, well educated on such a basis, made thoroughly conversant with the whole, before they devoted themselves to any given range of practice, would not only be the means of perpetuating a consolidation once made, but would be equal to the various claims upon them in the course of their professional career, and much of that difficulty which is now felt in selecting judges and others for offices in the colonies, where peculiar systems of law prevail, would be removed ; always supposing that the consolidation was framed on a system, in its general features as applicable to one scheme of law as to another—namely, on the principle of personality, which constitutes the subject of every kind of law whatsoever.

MR. A. M. PARKHURST advocated the necessity for a system of education, common to both branches of the profession, in the provincial cities and places, as well as in the metropolis. Many were so circumstanced that they could not afford to reside in the metropolis for a long period.

MR. G. W. HASTINGS remarked upon the necessity for a more systematic and careful education of both branches of the profession ; and argued that the present system of admission to the bar was improper and anomalous in the highest degree. It was most absurd that men should be appointed to high and responsible positions, open only to barristers, without having given any proof,

by passing an examination or otherwise, of their ability to perform the duties assigned to them.

Mr. Hastings enlarged upon the immense evils resulting from the appointment of incompetent men to colonial and Indian judgeships.

The CHAIRMAN expressed his great satisfaction that, in the able paper read by Mr. Broom, that gentleman advocated a system of education common to all who might intend to adopt the profession of the law, whether as solicitor or barrister.

MR. SARGEANT asked Mr. Broom whether his system contemplated an attendance in chambers?

MR. BROOM replied, that he considered that there should be no interference whatever with that part of a student's education.

MR. JOHN LOCKE read a paper on the expediency of facilitating the sale and transfer of land.

In this paper MR. LOCKE argued that the success of the Encumbered Estates Court in Ireland, now converted into a Landed Estates Court, was open not only to the encumbered proprietor, but also to the unencumbered proprietor, without the necessity of resorting, as he sometimes did, to contrivance for the purpose of bringing himself within its beneficial operation.

The paper also stated that the court, which originally was unpopular with the profession, on account of its supposed tendency to divert the employment of the profession into other channels, had become popular from its having been found, by quickening and cheapening transactions, to multiply them in a corresponding ratio.

MR. LOCKE considered it to be a complement essential to the completeness of the new Land Tribunal, that it should have a fuller registration, including maps, and extended to derivative interests to the amount of a twenty-one years' leasehold.

In answer to Mr. Jevous, MR. LOCKE stated that the proceeds of land sold under the Encumbered Estates Act represented the land, and were dealt with according to the priorities of the parties interested.

MR. WAKEFIELD read a paper full of valuable suggestions. He considered that the idea that titles to land were insecure, was traditional merely, and not founded in fact, but that the investi-

gation was dilatory and expensive, and not suited to the exigencies of commercial persons, who desired to use their property in land for purposes of deposit, or to raise money readily, as distinguished from those who used their property for family purposes simply, and therefore did not care so much for the expense and delay if the title were secure. The object was to secure both these purposes, and he thought that might be done by the establishment of a court for granting parliamentary titles, assisted by a system of registration of a private nature, which should require that every primitive deed should have the first derivative deed under it noted thereon, and on such derivative deed any deed founded thereon; the fact of its being notified on the primitive deed being also notified on the derivative deed, and also assisted by a system of depository, where fac-similes of deed might be deposited.

Mr. Wakefield's plan is probably more nearly akin to the private methods now in use, coupled with the purposes sought to be obtained by a system of registration, than any other method which has been suggested, and on this ground he enforces its adoption in preference to all others.

The chairman (MR. COOKSON) gave some explanation of the working of the act in this respect.

MR. J. G. J. GREENE, M.A., of the Inner Temple, advocated the application of the Irish Encumbered Estates Act to England.

LORD BROUGHAM, having returned, took the chair.

The chairman adverted to the copyhold tenures prevalent in Cumberland, and recommended that attention should be given to a statement put out by Mr. Fawcett on that subject, in the form of a letter to himself.

MR. JEVOUS argued that, as land now produced thirty years' purchase, the charges of transfer could not be so heavily felt as was alleged by some of the speakers.

On the motion of Mr. E. T. Wakefield, seconded by Mr. M'Fie—

Resolved—That it is the opinion of this department, that the delay and expense now incident to the transfer of land is detrimental to the public interests, and that it is highly desirable that a comprehensive measure of amendment should be effected for the purpose of remedying the evil.

MR. M'FIE read a paper, recommending that persons, other than the patentee, should be at liberty to use the patent, or the improvements of it, upon the terms of paying to the patentee a reasonable price for the benefit, even although the patentee should object.

LORD BROUGHAM expressed great doubts, but, on the matter being put to a division, the department affirmed the proposition by a majority.

The idea on which Mr. M'Fie proceeded seems to be, that the objections to a monopoly of ideas which men usually adopt about the same time under the suggestions afforded by the circumstances of the time, ought not to be absolute but conditional, and should be subject to a modification, which would admit of the use of the invention in aid of other purposes not included in the original patent; whereas now the patentee not only secures his invention for some particular purpose, but for all others, although he may never have dreamt of such extended application.

Mr. M'Fie made a statement in explanation of his views.

Moved by Mr. M'Fie, seconded by Mr. Danson, and

Resolved—That the department deems the suggestion offered by Mr. M'Fie as especially worthy of the attention of the Association, and that it should be referred to the committee appointed for that purpose.

MR. MERRY read a paper on the payment of common and petty juries. He showed that every body else connected with the administration of justice, including the special juries, were paid; but that the common juries, who consisted of persons dependent on their daily labour, received nothing. He argued that the receipt of some remuneration would less disincline them to serve, and thus facilitate the administration of justice.

MR. EDGAR read a paper on the administration of the law by justices of the peace. The writer deprecated the appointment of justices of the peace without qualifications of knowledge and special capacity, and particularly the appointment of the clergy. He quoted largely from the speech of Lord Brougham in 1828, on the nature of the office of justice of the peace, and the manner in which it was then filled, and recommended, on account of the great importance of the office, the extension of the system of stipendiary magistrates, especially since the criminal jurisdiction

of the magistrates had been so much extended, and that qualified persons should preside not only at the court of quarter-sessions, but also at the courts of petty sessions, where so large a portion of the administration of justice of the country in matters affecting the people was transacted.

MR. EDGAR read a paper on the office of coroner, by Mr. Henson, in which, adverting to the constant disputes and collisions which spring up between the magistrates and the coroners, owing to the jurisdiction which had been conferred on the former, in relation to the settlement of the remuneration of the latter, Mr. Henson recommended that the office of coroner should be paid by salary instead of fees, and that his inquisitorial powers should be extended to many cognate matters affecting the health and condition of the people, whose officer he was, such as adulteration of provisions, use of false measures, and other matters of the like nature.

With this paper the public business of the department closed for the session, with the exception of the address of the Chancellor of Ireland, which was read on the following day, Saturday, when the business of the entire Association was brought to a conclusion.

We propose to give an account in *resumé* of the Transactions of the Section for Jurisprudence and the Amendment of the Law. In so doing, we shall not take the matters in the order of their occurrence, which was necessarily determined by sundry circumstances of convenience, occasioned by the exigencies of the moment, but rather present them in the order of their relation to the subject-matter of the department as an organ of scientific exertion ; and thus endeavour to retrieve, as far as possible, the loss of importance which subjects of the highest order are apt to sustain, through the displacement of their rank, by the circumstances to which we have referred.

The papers, twenty-one in number, somehow or other touched every part of the field of jurisprudence and law ; not that the competitors much regarded their place—they were suitor-claimants, more intent on bringing into view the subjects in which they were interested, than concerned to give body and form to the whole work of the department.

And we are inclined to think that the managers of the meeting

showed much practical wisdom in treating the affair as a species of free conference, rather than an assembly where matters were to be marshalled in due logical order, according to some pre-appointed arrangement founded upon principle and strict propriety.

We think the course of freedom adopted a very good one, and with some improvements in the method, one which will, in all probability, generate and develop a very reasonable and effective result; at the same time, we would offer one or two suggestions calculated to increase the effectiveness of the undertaking.

Our first suggestion would be, that, according to the original design, the addresses of the president of each section should be delivered before his own department, in its appointed place; and that it should consist, besides such general remarks on his subject as he may think proper to make, of a sort of charge to the members of his department of the matters that are to be presented to its notice, which will have the effect of giving "solidarity" to the section, and of attracting attention to those graver and more comprehensive papers that cannot be appreciated on a mere reading, and at the same time of showing their place in the field of operation.

If, in addition to this arrangement, the reporter-secretary should give a short abstract of the positions and propositions of the writer, the press, which did so much at both meetings to make public their proceedings, and give effect to them, might, without sacrifice of time or space, do much more. Such abstracts should be very concise; just such as would attract attention to the leading points.

It would also be of the greatest possible service, if the reporter-secretary should, at the end of the meeting, give a *resumé* of the transactions—a measure that would be greatly facilitated by the previous extracts.

These operations would tend to give body and form of a scientific character to the labours of the Association, and to lay the foundation of successive improvements in an undertaking so well begun, and in so short a time marked with such signal success.

In addition, if labourers could be found to undertake the work, there might be attached to the other departments members of the jurisprudential branch, who would report on the matters, especially

if unrecognised and unprotected by law, disclosed in the other departments in the course of their discussion, on their own proper subjects.

The result of this arrangement would make itself apparent, if we consider that the other departments—the departments of Health, of Education, of Punishment and Reformation, and of Social Economy—are concerned principally about the discovery of the true state of interests, and the means (not jurisprudential) of realizing those interests; while the jurisprudential and legal department is concerned in the institutions and legislation by which those interests may be recognised and realized in the form of right by the state or community, and the public authorities which represent its power.

Besides, without some such arrangement, the departments are apt to forget their common relation, and their common purpose, and their common means.

We should deeply regret if the suggestions we now offer were construed as in the slightest degree impugning the management, which has been so successful. It is from our fulness of hope that in the same way the management will be pursued, that we are tempted to propose to engraft on it modifications calculated to make the success more decisive still, and to lay the foundations of scientific results which shall justify to all time so great efforts.

Of the thousand and one matters now under consideration, no small portion belongs to the department of jurisprudence—a department which the public eschew because it is lawyers' work, and which lawyers eschew because it is not practical. It is of the class of work which is at once everybody's and nobody's, and either grossly neglected or the prey of amateurs.

Hence, the universal sense of the need of a minister of justice—an officer of state, whose appointed duty it shall be to take charge of this class of work, and to be at the same time responsible for its execution, and remunerated by pecuniary reward and by honour for his labours.

As a substantive subject, this proposition was not made except in the address of the Lord Chancellor of Ireland; but Mr. Symonds, in his paper on the requisites of the legislative arrangements of a ministry of justice, indirectly treated of the proposed office.

Besides the view which he entertains in common with Lord Chancellor Napier, that the department of justice should be a department of the privy council, the brain of the state under the presidency of the chancellor, he suggests that the other departments of state—that of the prime minister, that of the president of the council, that of the chancellor of the exchequer, and that of the secretaries of state—should be reinforced by the aid of counsel, not merely skilled in the phrasing of laws, but in the history, state, and of the rational departments with which they are connected; and, moreover, that the attorney-general should, as public adviser and public prosecutor, also be reinforced.

He considers that, while provision is made for the execution of those abstract matters of law and jurisprudence which belong in common to every department, nothing should be done to weaken the obligation and the responsibility of other departments to perform, to the full, their own proper offices.

Moreover, while he professes that the counsel to the great departments of state should revise the government bills prepared by the different departments, Parliament should, by the aid of its own accomplished and well-paid officers, undertake the task of revising current legislation.

But to give definiteness of aim, and to lay the foundation of future legislation, and a plan for the maintenance of general law, consolidation or code, once obtained, he proposes a state register, to which we have adverted elsewhere.

This register, he proposes, should constitute the basis of records and legislative operations of the office of minister of justice, and indeed of every other officer of state; for it extends to every branch of administration of whatever kind, and it might be used with advantage by the National Association, to bring into connected view the subjects which, from the accident of the point of view, of treatment, or designation, may appear to have no proper place.

From want of such a chart, the extent and variety, and the relation of the subjects treated of, will not be readily perceived, nor the progress which is made in the establishment of scientific results.

One of the leading subjects of this department was the proposed

reform of the bankruptcy and insolvency systems, leading, in point of time as well as of importance, to many important classes of persons. We will not go into the details of the discussion. Our readers are aware that these systems are administered by different courts, both in the metropolis and in the country. If the creditor is the suitor, if the debtor is the suitor, they must apply to her Majesty's representative of justice, or a different *officina* of justice, according as the debtor is denominated a bankrupt or an insolvent. Albeit, in either case, the *gravamen* of the predicament is, that if the insolvent or bankrupt cannot pay all he owes, and is willing to surrender all he has to his creditors, two armies of judicial officers, at double the expense, are assigned to do the business, two sets of acts of parliament, two sets of organizations, two sets of buildings and the paraphernalia of two courts, two sets of procedures, two sets of forms of all sorts, bandying from court to court refusals to meet the claims of creditor or debtor, the functionaries of the courts at war with each other as to their respective jurisdictions.

This duplicity multiplies every difficulty and every expense, and prevents either court from being endued with all the mechanisms that are essential to the execution of its work, be it administrative or be it litigant. Each court is defective in some one or more essential particulars, which might be supplied, without additional expense, by union of the two.

But, before we can deal with the question, we must know what are the essentials of a court of administration, and what the essentials of a court of litigation.

A court of administration is in all respects like a department or office of administration—it has precisely the same functions to perform, and should set about them in pretty nearly the same order. It should have provision for all the elements of business, for the reception of the claim, for inquiry into the grounds and reasons of it, for appointing the resolutions and instructions, for giving the due direction thereon, for negotiating the business between the contending parties, for reducing the business into the formal shape of acts, for registering all particulars, for executing the correspondence and all the other proper works of a secretary, for keeping the treasure and the accounts, for

auditing the accounts and economising the management and expenditure, for remembrancing the transactions, for superintending them, for chronicling them, for controlling them, for managing the matters, and supervising their execution in detail.

Now the Court of Chancery, and all the courts in the kingdom, are wholly deficient in the official management of the business of their courts, from their entire want of official routine in this department of their affairs—official business has been engrafted on the judicial business, instead of running parallel with it on its own proper line.

The official department of every court of justice ought to be as perfect as it can in the execution of its business, and the chief of the court should have an official principal, similar to the chief of the staff assigned to the commander of our forces in the Crimea. An excellent judge may well be forgiven if he is not the best of officials; but he cannot be forgiven for not insisting on being provided with all the necessary means of doing this important part of his duties.

The judicial business is well settled in this country, and is in the main well done. The objection is, that our procedure is not quite simple enough, that fiction is sometimes permitted to take the place of truth, and that sometimes things are done judicially which ought to be done administratively.

If these primary questions of the nature and organization of tribunals were first settled, many other questions would be solved. We think that there should be an official survey of all our tribunals, and, with Mr. Hastings, that they should be consolidated as far as may be. This would be advantageous to every class—to the community at large, which would have but one tribunal to observe; to the suitor, who would be relieved of the puzzle as to the court which is charged with the jurisdiction in his case; to the judges, who, being in like manner relieved, would be enabled to concentrate their attention upon the substance and the principle, instead of the mere formality, or the mere fringe of a matter; to the advocates, who would have but one court in which to practise; to the practitioners generally, whose time would not be wasted in attendance on different courts.

The public would profit by the higher, because more efficient,

character of such courts, which would be at once comprehensive and single, and well provided with every species of assistance, both by way of counsel, and by way of official aid.

All the subordinate questions of registrar, official assignee, messenger, would be determined by the fact, that their functions would devolve on those officers who should perform the like duties for the other business of the same nature of the courts to which they belong.

It is good that the commercial community of the country have directed their attention to this matter ; but it is time to consider whether the Courts of Bankruptcy and Insolvency have not fulfilled their intermediate function, of preparing their jurisdictions to be amalgamated with the other judicial jurisdictions throughout the country. All the conditions of the interests and rights, both of creditors and debtors, and of the state, in this matter, are well settled :—the whole doctrine, if it were digested, would be found to be for the most part complete, with perhaps some emendations not affecting the broad considerations of policy and justice.

But it is of great importance to the country to ascertain, whether the same amount of effort which would be required to settle this question, would not go far to settle the whole question, of which this is only a part. The scheme of tribunals, both as regards all the local jurisdictions, and as regards all the subject jurisdictions, and as regards the hierarchy of tribunals, and their due subordination to the laws, which should be one and the same for the whole people.

We do not suggest that we should attempt to leap at once to this result. There may be yet other intermediate steps to be taken for bringing about such results safely, and effectually, and with general concurrence (which, perhaps, is a condition-precedent both to safety and effectuation) ; but we do contend that, in whatever work of this sort is now undertaken, we should keep in view the object, about which there is now a general agreement.

It has been foolishly said, that the several efforts to reform the bankruptcy courts have been failures. If every imperfect measure, forced on the legislator by the ignorance of the community, by the reluctance of the representative, by the state of affairs, is to be considered a failure, rather than as a step in

progress, failures they have been. But we are of opinion that, without such failures, we should not have reached the present advanced state of public opinion on this matter, and the consequent disposition to grant an efficient reformation in our court of debtor and creditor, of bankruptcy and insolvency.

Nor do we counsel the advocates for this reformation to withhold their exertions till larger reforms have been effectuated; but this, that in fashioning a court of bankruptcy and insolvency, it should be done in the fashion of tribunals in general, so far as that fashion is applicable, and that the special incidents should be special only to the extent of the special requirements; so that, when it shall come to pass that the public conviction is ripe to adopt the system of consolidation in full, it may be done by mere amalgamation, after registering what the courts have in common, or even at first by mere amalgamation till the new and the old have come to work in harmony together.

Nothing has so much tended to establish the present improvement of the common law as the uniformity of procedure, and the subsequent uniformity of official organization in the offices of the superior courts of law.

The law reformer, abating his eagerness to effectuate reforms, the necessity for which is now universally conceded, should seek rather to put matters on such a foundation, that the public wish may be realized without violent measures, and with the concurrence of public officers, now sufficiently amenable to public opinion, to be relied upon for a faithful adhesion to the cause of progress, or law amendment.

We think that our parliamentary reformer would therefore do wisely (even if he should think it expedient not to withhold his support to the proposition—to make the proposed changes in the bankruptcy and insolvency systems) to draw attention to the larger question—the Aaron's rod—which, if wisely used, would swallow up all those smaller, though far from being less important, questions. Their importance is as great as the importance of the other questions that constitute the greater; and they are only less important, as the part must in all cases be of less importance than the whole, which includes the art itself.

We think that, by so treating these matters, they would be

made intelligible to parliament, and there would be much economy of stentorian effort, and of parliamentary management, and of that bye-argument, sometimes sneer and sometimes innuendo, which constitutes a mass of unseen, but by no means uninfluential exertion; and for very shame the officials would be compelled to concede the suggestion and the aid which are always requisite to make the best measures conformable to, and efficient for, their purpose.

We cannot but hope that the National Association for the Promotion of Social Science will, at their future meetings, take the field in this comprehensive manner, not rejecting, or ignoring, or slighting, as unimportant, any contributory measure; but rather giving place to every suggestion, and shewing how the vastest measures owe their success to portions apparently insignificant, and relatively unimportant, but really of as much importance as the screws that fasten together the masses of iron of the tubular bridge, the absence of which would defeat the entire object.

It is in this spirit that we contemplate the various suggestions made at the recent meeting, which, instead of being overlaid and hidden, would be displayed and made manifest, by being placed in due correlation with the whole and the parts of the system to which they appertain.

The able paper read by Mr. Edgar, the secretary of the department, on professional remuneration, is deserving of particular attention. He advocated a gradual alteration of the system of remunerating solicitors, by the substitution of a system of free contracts between solicitor and client for fixed rates of charge. He stated the case with great moderation, and founded his recommendation upon the tendency of fixed charges to induce the practitioner to lengthen proceedings and documents, since by that means only could he obtain adequate remuneration for the knowledge, labour, and skill, which he should employ on matters which the fixed charges did not meet.

This subject of remuneration is one which needs scientific inquiry in relation to all classes of affairs.

The proper course would be to collect the systems in use in different callings, and to consolidate all the systems in one volume; to ascertain the matters in respect of which the practitioner

is entitled to indemnification and reward, whether personal attendance, intellectual attention, actual labour, negotiation or co-operation with others, or the authority derivable from standing and influence. His education, his outlay, his learning, his experience, the difficulties of the task, the responsibilities, the value of the service to the client or patient, or other, are all elements of consideration. The history of the manners in which the matter had been dealt, the claims made on both sides, the determinations arrived at after dispute, would be the proper means of investigation.

Thence would come the question, whether a person is better paid for detailed items of service, or by the job, and whether the system of remuneration, which brings into account every item of outlay, and every item of service, which is usually adopted by the portion of the profession which deals with material and the more mechanical parts of work, is more appropriate than that which is usually adopted in the portion which treats more especially of the intellectual part, as advocates, architects, &c. It may be held that the conventional practices have in their origin been well founded, but that, as with most customary matters, the usage may need adjustment. The professional person is not wholly master of the position. His work is dependent not only upon himself, but on the state in which the business comes into his hands, on the state of the law, on the state of the information available to him, on the state of the doctrine relative to the matter, on the conduct of the client, on the conduct of other parties, on the state of the organization and procedure of the tribunals, on the state of the business of the tribunals; not unseldom, however, upon his ignorance, his unskilfulness, the state of his establishment or the state of his business, and on the state of the business of his co-negotiator.

Few take into consideration what a solicitor really is. He is for many purposes one's *alter ego*; and if he would be, as we have often recommended, more a man of business than a man of law, he should be for most purposes our *alter ego*. At present there is no class of persons able to serve us in that capacity; that is, whose arrangements are of such a nature as to enable them to do such work easily to themselves, and inexpensively to their clients.

There is no service which the Association for the Promotion of

Social Science could render to the community, so morally and beneficially important, as the discovery of its wants in this respect, and the calamities that ensue to individuals, and communities, and states, from these wants not being duly supplied. The Bankruptcy and Chancery courts, and the Incumbered Estates court, tell the story as regards individuals ; the Crimea as regards states and armies, parliaments and ministries.

But this question of remuneration pervades every question that we touch. The great objection to every reform is the cost ; and the fear of creating a permanent charge after the occasion has passed away, is the obstacle to the adoption of almost every proposition.

In the papers read before the department of jurisprudence it was a constant element. In Mr. Symonds's paper on the legislative arrangements of a ministry of justice, and in the papers of Mr. Serjeant Woolrych, and Mr. Sargeant on the statutes ; in Mr. Hastings's proposition for the consolidation of the courts, and Mr. Heath's for the establishment of commercial courts ; in Mr. Wakefield's scheme for savings banks, and Mr. Locke's extension of land estates courts ; in Mr. M'Fie's paper on patents, and Mr. Merry's paper for compensation to juries ; and in the paper of justices of the peace.

Take up any subject, and the question of remuneration proves to be a cardinal one. There is no doubt that freedom of contract tends to bring all such matters to a level ; but there are many cases to which this freedom is not applicable, and, even as regards them, a conscientious person would desire to know the principles on which such matters depend, that he may not make a stand upon a false and untenable ground.

We trust the Association will, in the interval between the present and the next meeting, institute an inquiry in this direction, and report the result on that occasion. Mr. Edgar's paper opens up the subject admirably, because dispassionately, and will form an useful basis of operation.

We have not extracted from his paper, for the reason we have mentioned elsewhere—its probable publication in the Transactions, and we shall observe the same rule in other cases. These grave productions should be read *in extenso*. They scarcely admit of

abridgment without injustice to the author, who, by the limitation of his reading to twenty minutes, has usually been compelled to be concise, sometimes more concise than the full and clear treatment of the question allowed.

In the interesting discussion which ensued on Mr. Edgar's paper, the upshot appeared to be a preference of the present method as a greater protection to the client, who in the present state of the law was placed almost entirely in the hands of his legal adviser, and could not, as in the purchase of an article in common use, easily correct a mistake made in the choice of his adviser, nor judge except empirically by the result of the value of the services rendered.

If the public at large were better informed as to the *rationale* of remuneration in all its forms, principles would obtain, and methods of adjustment would speedily follow; for, though all services would not admit throughout of the same scheme of remuneration in detail, yet almost all would be found to have some common elements, which would reduce the range of controversy, and tend eventually to a common standard for, at least, the greater part.

We regret that the attention which we must give to other subjects prevents our entering more fully and exhaustively into this, which lies at the bottom of many social difficulties.

In the plan of a state register, Mr. Symonds provides for the gradual accumulation of information and law on this subject, as well as on many other special subjects of the like nature, the result of which could not fail to be a good general usage, and probably a good statute, embodying the whole law of what we quaintly and absurdly call "*Assumpsit*"—a law which runs parallel with the whole range of functional action or service, and is the sweetening correlate of the other awful phrase, "Responsibility"—both of which together constitute about one-fifth part of the law of the land.

The claims for tribunals, and for the consolidation of tribunals, and for the extension of the jurisdiction of tribunals, and of the power of tribunals to enforce their decrees by attachment of property and of debts, all point to inadequate remedies, and the

means of making them adequate. Of this nature is the claim for land tribunals, by Mr. Locke and Mr. Wakefield ; for commercial tribunals, by Mr. Heath ; for the consolidation of the tribunals of great provincial towns and cities, by Mr. Hastings ; for attachment of foreign debts, by Mr. Danson.

They also point to the necessity of a single comprehensive parent tribunal, and single comprehensive local tribunals, presided over by judges omni-competent in their authority, and omni-competent in instruction, and omni-competent in their assistants, or experts in the different ranges of their jurisdiction, and devoted to their duty throughout the year—to the necessity of a common body of recorded law, embodying in an accessible form all the statutes, all the decisions, and the questions from time to time raised ; and a common education of all judicial and legal personages upon the same common basis ; and a common procedure ; and a common appellate tribunal, embracing the whole field of law, and composed of all the personal elements necessary to constitute a high court of appeal in a country where the interests are so various and so intricate.

We have passed in review the contributions of the present meeting. Do they fulfil the purposes of the institution ?

This department is entitled Jurisprudence and the Amendment of the Law. In it are to be discussed the science (we could also say and the art, for jurisprudence is both an art and a science) of civil jurisprudence, its bearing on the social condition of the people, the advantages desirable from a wide diffusion of its principles, the practical defects in our laws, the evils arising from such defects, and the fitting remedies.

Its bearing on the social condition of the people,—on persons, on proprietors, on merchants, on functionaries, on suitors, on subjects and rulers, on the instructed and the instructors, on suitors and judges and legislators, on contributors to the public resources, on officers general and local, and on the mutual relations of all such persons with one another, and with the common good.

The advantages derivable from a wide diffusion of its principles to the citizen, to the subject, to the public authorities,

in the cultivation of good-will and the economization of peace, and the necessity for public interference.

"*The practical defects of our law*"—in the recognition of right; in the correlation of obligation with right; in the adequacy of power for the exercise and vindication of right; in the freedom of action without needless technicality and unnecessary conditions; in the simplicity of actuation, or the recordation of and evidencing of action; in the completeness of protection; in the assertion and exaction of responsibility, and the appropriate compensation of remuneration.

"The evils arising from such defects."—The diminution of the capacity of the individual to realize his own happiness, and that of his family and others dependent on him; the discontent of the subject, the practical augmentation of burdens, the restriction of enterprise, the denial of employment to available service, the withholding of the suitor's claim, the augmentation of his anxiety, the war of classes, the hesitation of authorities in the discharge of duty, the dubiety and want of *prestige* of the courts of justice.

The fitting remedies.—One sovereign representative of justice in the whole state, and in each locality one consolidated body of law adjusted to all interests; one tribunal, with ramifications over the whole country, with suitable capacities for each subject-matter of administration, legislation, and litigation; one state register of all the administration of law; one body of judicial and legal representation and agency, trained in the various schools, institutes, colleges, universities, and constituting one university of state or law.

We have thus drawn out *in extenso* the brief enumeration of the purposes of the Association, in order to found thereon a means of bringing in view all the suggestions that have been made, both during the recent and the former meeting, and pointing out wherein a course of development may be pursued with advantage.

But before proceeding to this *résumé* of the matters falling to the department of jurisprudence and the amendment of the law, it might be well to mark its relations to the other departments—that of education, which has regard to the being of every person, and the developments of his faculties—that of health, of the

whole body politic as of each individual—and that of social economy, or the art of helping one's-self and one another; of one's self, one's household, one's kindred, one's family, one's friends, one's acquaintance, one's professional and all other means of help, by recognition, by information, by sanction, by contribution, and by personal assistance: in short, the help which an individual can give, and the help he requires—the mode in which he can help himself, the mode in which he can help others, and the mode in which he can be helped by others; and, generally, the means of helping one another without the aid of the state, either by one's own personal exertions, or by professional aid purchased by one's own private resources. Civil jurisprudence concerns itself with the enforcement of these voluntary arrangements, and with the enforcement of those arrangements which appertain to the peace and welfare of the community which constitute the body politic; the other departments are concerned with the recovery of interests, and the means by which they may be realized without recourse to law. Jurisprudence, with the recognition of such interests, with the definition of rights founded thereon, and with the vindication of such defined rights.

Now, although the department has hitherto sat merely in free conference, which is always the best manner of initiating a novel undertaking, it has collected a vast amount of material, by means of which its operation may henceforward be reduced into a more shapely and instructive form.

In the recognition of the necessity of the office of minister of justice, it has impersonated the action of the subject; and in the recognition of the relations of that office to the other departments of state, it has indirectly tended to mark the character of the entire fabric.

The proposals for the recordation of the law, for the purposes of promulgation, administration, and legislation, and the proposal of state registers for the registration of the administration of law and of public affairs, and the proposal for exhibiting in outline the Victoria code, according to the personalities of which the whole state and each part consists, afford a chart for the embodiment of the entire range of matters which come under the consideration of the Association—a basis of operation answering to

the basis of operation which the state itself (whose supplementation the Association practically is) might advantageously adopt.

Next to the establishment of the personal representation of the affair of law and justice in the minister of justice, and to the embodiment of the whole range of subject-matter in the state register or Victoria code, comes the consideration of the tribunals, in whom is invested the power of intervening in all courses of public or private wrong, or question.

How anciently all places of any note or mark had their tribunals, Mr. Hastings shewed in his excellent proposal for consolidating the local courts that now subsist in many of the ancient principal places of the realm; some of them invested with plenary powers, and indeed occasionally with greater powers than are, or were till lately, possessed by the superior courts of the realm.

The discussions that have taken place on this subject shew the need of the localities; and, moreover, their sense of the need for their claim for special courts is expressed with more than earnestness. Great places like Liverpool, Manchester, Bristol, the centres of active commercial enterprise, giving rise suddenly to embarrassing and disastrous questions, feel the necessity for a more rapid dealing with such questions than can usually be given by the old broad-wheel wagon of the superior courts, assisting them at long intervals at the assizes, and then only for a short time, and in a very hurried manner.

It is manifest, from the tone held on these subjects, that the arbitrament will not much longer rest with the magnates of the superior courts, and that the question must be entertained, as was very justly alleged by one of the readers of papers, Mr. Heath, on a broader basis than the more convenient distribution of circuits. The local people claim constant administration of justice, by men of the first order of ability, in the presence of an educated bar, instructed in the whole range of legal and jurisprudential lore.

This brings us to the great question of legal education, to which Mr. Herbert Broom's paper referred. He recommended an extension of the system now in use, and that not only persons intending to practise, but that all persons desirous for any cause to know

the law, should be at liberty to attend lectures, and might take certificates of honours; the professors of the different colleges and universities interchanging their papers, and endeavouring to arrange their treatment of their subjects, so that that of the universities might be preparatory to the more special and detailed treatment of the professors of the Inns of Court.

The suggestions elicited general assent, with the addition of recommendations that means should be fallen upon to give to the centres of industry special means of instruction in law; so that the pupils and articulated clerks might not be compelled to resort to London for lengthened periods, at an expense disproportioned to their means, or for a time inconsistent with their state of pupillage or apprenticeship.

It was urged with great force by Mr. Hastings and other speakers, that there arose much evil and discredit from the selection of men, both in this country and the colonies for judicial offices, requiring a much wider range of knowledge than could be obtained by our present piecemeal method of training, by which men learn portions instead of the whole body of the law.

It was pointed out that this constituted a great difficulty in adjusting the courts to the demands of the inhabitants of localities. There were few men, if any, practically conversant both with law and equity, with commercial and real property law, with criminal and prerogative law; and that until the law should have been embodied in a code or consolidated body of law, and the education of lawyers should be co-extensive with the whole body of matters needing the intervention of the tribunals of justice, it would be impossible to meet the claims of the public in this regard.

For this reason Mr. Smale proposed, in his paper on the equitable jurisdiction of the county courts, that these tribunals should not for the present be invested with such jurisdiction, but that advantage should be taken of the equitable jurisdiction that now exists, in the Chancery Court in the county palatine of Lancaster, to give that part of the country the benefit of the united jurisdiction, which might hereafter serve as a model for secondary courts of equity in the provinces, when circumstances should admit of such extension of jurisdiction.

But we cannot but feel from what has taken place on the occasion, and on former occasions, when the question of new tribunals has been on the tapis, that there is a previous question which needs solution ; namely, the common constituent elements of a court of justice of whatever kind, the organization of its body of members, and the arrangement of its procedure.

The collection of materials, by means of the process of consolidation, recommended by Mr. Symonds in his proposal for a state register or Victoria code, would furnish the means of exhibiting such elements, without conjecture or empiricism, the whole body of courts in this country furnishing, without doubt, the whole body of requisites of the most perfect court.

Many old professional persons, whose prejudices would war against proposals for establishing an apparently new thing, would at once give in their adhesion when they saw that the proposal, though new in the completeness of entirety, was but a composite of old things put together in somewhat better fashion.

There are other topics to which we would willingly have adverted, but time and space forbid. We trust that the Transactions of the Association will soon make their appearance ; that in the interval that will elapse before the next meeting of the Association we may discuss them, and, at the same time, enter into the consideration of the means by which the scientific results of so much valuable contribution may be collected and recorded, for the realization of the fair pretensions of the society to be an Association for the Promotion of Social Science.

Neither Rome, nor any science, was built in a day. It is enough that the idea has been established, and that on two occasions there have been great gatherings of earnest persons bent upon, and not incapable of, realizing their intentions.

Doubts have been entertained whether there can be such a thing as social science ; but if science be systematized knowledge, and the elements of knowledge be facts and their relations, and the subjects of social science the human being and his interest in the state of society, there seem to be the means of erecting a science as definite as human knowledge on any subject can be, where the predicaments are ever undergoing modification, and none can scan all the predicaments ; but is not this the case

with all science? Is it not an ever-expanding scheme of knowledge, extending in the range of its foundations and of its altitude, and ever rearing its mighty structure so as to be beyond man's ken in the fulness of all its details, but ever, too, with the extension of its generalization, teaching the simplicity, and unity, and comprehensiveness of its principles; and, by the help of principle and apt designation, enabling us to take into our mental grasp its nature and its scope, though not its infinite magnitude and undiscoverable minuteness?

It has been questioned whether the late meeting at Liverpool has been a success. To all who were present, the welcome of such a gathering, and of its purposes from all classes, would be test enough of success; for when every condition of persons unites with its opposites in agreement with a common cause, we cannot doubt the recognition of its value which that circumstance implies. Nor is the questioning a less proof of success; for men do not question so earnestly and so searchingly what has not prevailed somewhat. The Association has done what a great gathering can do—it has recognized and sanctioned the effort. It is for the philosopher to hie back to his closet, and there, by profound research and thought, to work out his subject till he has mastered the principle so thoroughly, that he can give to it that clearness of expression which is always the attendant of such mastery, and of such mastery only. The statesmen and the men of the world may have looked on this subject with reference to their ends. Be it so—the results in practical life can be worked out only by political agency and the agency of the men of the world; and we have no right, in this system of popular representation, to expect that statesmen shall act till the people express their want.

As in all businesses, the action of the process always seems to be imperfect till the result is shown. In the laboratory, in the workshop, in the office, in the kitchen, in every place of preparation, nothing shows itself spick-span, complete; indeed, if it appear so, we are apt to think that such a namby-pamby state of things shews a nicety not altogether consistent with earnest energy.

In this view we see nothing to make us feel that the action of the Society is either feeble now or likely to become so; and we

should hope that the only effect of such questioning will be, now that the mechanisms of external management have been settled, to induce the council to go more thoroughly to the work of recordation, and give to their labours the directness calculated to produce scientific results, and to consolidate the teeming suggestions of many earnest minds seeking to establish partial objects, the wholeness and completeness of principle, and yet the feasibility of practical measures.

We cannot bring to a close this brief and necessarily imperfect sketch of the proceedings which took place at Liverpool in the Jurisprudence Section of the Association, without expressing our sense of the zeal and ability shewn by Mr. Edgar, the secretary to this department, in all appertaining to the business there transacted, and of the administrative talents so pre-eminently displayed by Mr. Hastings, the general secretary of the Association—to which Lords Brougham, Shaftesbury, and other distinguished speakers, bore such ample testimony.

ART. IX.—EXTRACT LETTER

FROM

LORD BROUGHAM TO THE EARL OF RADNOR.

“ —BUT I must here turn aside for a moment from our own jurisprudence, and the amendment of it, to congratulate you, which I do most heartily, upon the measure in contemplation, we may say actually begun, for effecting a great improvement, perhaps the greatest that can be conceived, in the legal system of a foreign country, and indeed in its social state—a country far removed from us both by its position and its institutions, and where we might the least have hoped, even in this age of progress, to witness any change—I mean the Russian Empire, with its vast population, the very great majority of which is in a state of personal, at least predial servitude, attached to the soil, and the property of its owners, as the inhabitants of the rest of Europe, even of England, were some

centuries ago. The just and humane, but also the truly wise policy of the present Emperor, with the full concurrence of his most enlightened and best informed councillors, has of late taken the direction of preparing the complete emancipation of the serfs by safe and well-devised steps. The obstacles interposed by the ignorance and unreflecting prejudices of some among the upper classes of landowners, greatly increase the merit of the sovereign, while they add to his difficulties; and the alarm which false views of their own interest have made them industriously raise, whether really felt by them or not, renders it a matter of doubt if we should dwell upon the subject in this country, lest our satisfaction may be ascribed to our prepossession in favour of whatever proceeds from, and supports, constitutional government, the object of our warm and just affections. The danger of popular movement, anti-jacobin clamour, cry of French principles, and other topics to which we were accustomed, rather than reconciled, during the Revolution, and which for a season destroyed some invaluable measures of improvement, and postponed so many more, might be the consequence in Russia of our gratification declared at popular meetings, as if we took part with the peasant against his lord. This apprehension I own it was, that made me most reluctantly abstain, at the late Social Science Congress, from giving expression to my feelings of admiration and gratitude for the wise and generous conduct of the Russian Emperor and his able councillors. But what I now write will only have the limited circulation of a professional journal, and be confined to the perusal of professional men. On the mode and manner of making this great change, I shall of course not now dwell, further than to express my earnest hope that the errors which either accompanied, or soon after followed our colonial emancipation, may be avoided; and that the gross inconsistency may not be committed, of making great sacrifices for the compensation of the landowners, and then both greatly injuring them and their peasantry, by exposing them to the competition of foreign produce raised in more advantageous circumstances, as we let in the produce of foreign colonies, the fruits of the slave trade, which we do our utmost to suppress, and thus at once encourage that execrable traffic, and injure

our own plahters and their liberated slaves. Nor is this the only great improvement which now engages the Russian government. Important amendments of the judicial system, and considerable facilities to the press, are understood to be more than contemplated.

“I have mentioned the late Congress at Liverpool, and I perceive no small number of mistakes committed as to its objects; and especially its tendency. Thus, some represent its labours as only calculated to obtain information, and diffuse this generally—a very useful thing, no doubt, and of importance proportioned to that of the subjects of inquiry, the great interests of the community in jurisprudence, in education, in the health of the people, and in their morals. But the propounding of opinions, and the discussion of them, is also part of the Association’s duties; and, I must add, which removes another error respecting it, that there never will be the least scruple about obtaining the opinions, and ascertaining the inclinations of large bodies, with the express view of affording help to the government and the legislature—help which cannot so well be given in any other way. Take an example from what has occurred, both in the last assembly, and in the first at Birmingham. The whole of the Bankrupt Law was fully discussed, with all the plans proposed, whether by the government or by individuals, for its improvement. Not only was a considerable body of information collected, but resolutions were passed, for the most part with unanimous approval, embodying the opinions of those who joined in the discussion. And who were they? Delegates from the Chambers of Commerce, and other mercantile bodies, in all parts of the kingdom. They for whom the law is made have the best right to decide upon its operation; and their decision is without appeal if they declare that they suffer under it. They have an equal right to propose the remedy, though here it by no means follows that their proposal must be adopted; it deserves, however, careful and respectful consideration. Who can doubt that the greatest benefit must accrue to the country from the aid thus given to the government? Parliament may hear the complaints of different places through their representatives; petitions may contain important information and

suggestion; but all this must needs be partial. The statements of opinion are of necessity insulated, and arise out of little discussion; whereas a congress of those who represent the feelings and the opinions of all the great trading bodies, must have a salutary influence upon the legislature, both because they have the amplest means of obtaining information, and because their judgment is wholly unbiassed by party differences.—Let me now advert to the measures of last session bearing upon the Amendment of the Law.

“It is certainly a mistake to suppose that nothing was done; though the change of ministry cut short some very promising measures, and gave a degree of despondency, I hope and trust groundless, to the friends of law amendment; at least there can be no ground for despair. The Attorney-general is a tried and efficient ally; he has already done something, even during the late session, though he has unhappily been prevented from accomplishing more—a remark which will be applied also to the Irish chancellor, by all who read his most able and enlightened address delivered at our late Congress. I must observe, too, that some of the amendments carried are much more important than at first sight they appear to be, because they remove great defects, one may say rectify gross blunders, in former legislation, brought to our notice by manifest failure of justice in causes actually tried. Thus it was found that the true construction of the old act punishing the obtaining money or goods on false pretences, did not reach the case of acceptance of bills, or signature of notes; so that a person might cheat you out of your acceptance, or signature, for £1000, because it had no value in your hands; but it became the means of at once charging you with that sum at the suit of the discounteer who had given value for it without knowledge of the fraud. At the suggestion of the Law Amendment Society, I obtained the assent of Parliament to a bill for amending this glaring defect in our criminal, I may say, in our mercantile law. The Copyhold Acts, which I was some years ago prevented from making as effectual as I had desired, and which did not give either to the lord or the tenant sufficient powers of compelling enfranchisement, still continue inadequate; but a considerable portion of the compulsory powers I had so long contended for, is given by an act passed late in the

session ; and I greatly approve of the provisions respecting certificates of incumbrance, which really make them a marketable security transferable by endorsement.

“The violent opposition to the Divorce Act of 1857, had caused many defects to be left in it. Though this is one of the few subjects on which I fear you and I still disagree, I know well that, if the proceeding for dissolving the marriage contract is to form part of our judicial system, you will be the first to admit that it should not be hampered with repugnant matter, and disfigured by anomalies which leave in its full force the principle objected to, and only needlessly increase the expenses of the parties seeking relief under it, and augment the difficulty of the Court in construing the act of 1857. The adversaries of that act resisted the Attorney-General’s bill to amend it ; and hence some material defects are allowed to remain. But considerable good has been effected by extending the judge-ordinary’s powers, by protecting the deserted wife’s property, by admitting the evidence taken in suits before 1857, by removing all doubt as to appeal in cases of nullity of marriage, and by enabling the court to dismiss a party from the suit in which there was no evidence against him, in order that he may be a competent witness. This last provision was thought necessary in consequence of the court having decided that my Evidence of Parties Act (1851) excluded parties under the act of 1857, and that they could not be made competent by dismissal. I ventured, with great deference, to agree with the minority of the judges who were divided in that case, and I had hoped that the judgment would be altered on further consideration. The new act, however, removes all doubt and difficulty.

“But another measure of the Attorney-General must be regarded as a very important step in the right direction, and is likely to be followed by further progress, though in itself it may seem to be of subordinate importance, from being confined to one kind of suit. I allude to the act, introduced for the first time into our law—the Declaratory Action, found so beneficial in Scotland, for the security of titles, prevention of vexatious litigation, and preserving the testimony of living witnesses. This act is confined to cases of legitimacy, marriage, and place of birth ; it enables any person to apply for a decree of the new court, declaring his legitimacy, the validity of the marriage of

his parents and their parents, and that he is a natural born subject. The decree is not to affect the rights of persons not cited in the cause, nor of those claiming through persons cited. The want of Declaratory Action in England has been complained of by all Chancellors when dealing with Scotch causes under that beneficial law ; and having more than once both joined in this complaint, and endeavoured to supply the defect (it formed the subject of one of my nine bills, introduced in 1845, the greater part of which have since passed, but not this), I begin to entertain hopes, from the partial success of my friend the Attorney-General, that hereafter the same remedy will be extended generally, and persons no longer obliged to continue in uncertainty of their rights until actually sued, when their adversaries alone may possess the evidence their case requires.

“ The step which has been taken in Ireland for the permanent establishment of the Encumbered Estates Court, and the extension of that most important jurisdiction to other than cases of incumbrance, is of incalculable value. It really gives one hopes of a similar benefit being conferred upon England. But I was induced again to present my bill for facilitating the transfer of real property; the postponement, however, of so large a measure for further discussion was quite unavoidable. I certainly consider it of great importance, and the rather because it is grounded on actual experience. The bill was drawn by my very able and learned friend Mr. Fawcett, and the plan is the result of his long and various experience. He is an excellent conveyancer and practised lawyer. But the experience to which I refer is as steward of many of our Cumberland copyhold and customary manors, during a period of thirty years. Thus, in one he has never found a single instance of disputed title in all the five hundred estates of the manor; they have every one been repeatedly passed by sale, mortgage, and devise or descent. The cost of the conveyance never exceeds a few shillings, and the length of the deed a hundred words. That the extension of this system to freehold estates will require some machinery for registration is clear ; but, when you consider the provisions of the bill, I would fain hope that you will admit the change in our system to be both practicable and safe.

“ The great extension and improvement of our judicial statistics,

is a matter of just congratulation ; and Messrs. Foulblanque and Redgrave deserve great credit for their most able co-operation in it. What my bill of 1856 was intended to provide, has been happily commenced, especially the extension to civil proceedings. When the plan is complete, legislation will become more entitled to the praise of being a science, and founded upon principles of induction.

“That I continue to indulge the hope of continued improvement, notwithstanding all our disappointments, is chiefly owing to the encouraging aspect of the times, and the now universal and even earnest resolution of the country for the promotion of well-considered measures of reform in our institutions ; and most of all, because it is the first of all, in our jurisprudence. I purposely pass by Parliamentary Reform, not that either of us can feel indifferent on that great subject, but because it belongs not directly to the matter now mainly in hand. Yet, how can I avoid turning my eye towards other countries when speaking confidently of our own steady, though occasionally somewhat tardy, progress, without feeling most thankful for our security from all that has happened to *their* reforms? Think, my dear old friend—well may I say so, for I am reflecting on the period of our first acquaintance at Professor Playfair’s class, during the Reign of Terror in France, perhaps in England too, when the savage and irresponsible tyrant, the multitude, domineered in the one country, and the law, through Erskine’s immortal triumphs, bore sway in the other—think how all has been peaceful progress, with freedom more firmly established here—and there.—But let us turn from the sight! The difference between the two countries, both well fitted for a free constitution, lies in a sentence, as I took leave to declare in our House when discussing reform in 1857. In England, there ever prevails, and ever rules, the wise principle of avoiding extremities in the most violent of party contests, so that by timely, and often by mutual concessions, our institutions may be saved; in France, all party conflicts tend towards disruption, and too often terminate in revolution.—Faithfully and affectionately yours,

H. BROUGHAM.

“BROUGHAM, *October 23, 1858.*”

Short Notes of Cases:
 BEING A SELECTION
 OF
ADJUDGED POINTS
 REPORTED SINCE 1ST AUGUST, 1858.

POINTS DETERMINED IN THE COURT OF CHANCERY.

By O. D. TUDOR, Esq., Barrister.

COURTS.	REPORTERS.
House of Lords	3 Macqueen, Part 2.
The Lord Chancellor and Court of } Appeal in Chancery	2 De G. & Jo., Part 1.
The Master of the Rolls	24 Beav., Part 3.
Vice-Chancellor Stuart	3 Sm. & Giff., Part 5.
Vice-Chancellor Wood	4 K. & J., Part 3.
Lord Chancellor and the Master of } Rolls of Ireland, and the Court of } Appeal in Chancery	7 Ir. Ch. Rep., Parts 8, 9, 10.

**I.—POINTS DETERMINED IN THE COURT
OF CHANCERY.**

1. Acquiescence—Partnership—Mines—Renewal of Lease by one Partner. 2. Collision between Foreign Ships—Merchant Shipping Act, 1854, (17 & 18 Vict., c. 104.)—Foreign Law. 3. Double Portions—Satisfaction—Scotch Law. 4. Evidence—Admissibility of, in case of an Erasure in a Will. 5. Executor—Indemnity against Covenant—Leaseholds—Administration. 6. Injunction—Forfeiture—Admission to the Crystal Palace on the Lord's day. 7. Interest on Charges—Tenant in Tail not bound to keep down—Tenant for Life—Arrears. 8. Notice—Binding upon a Purchaser if given before payment of Purchase-money. 9. Pre-emption—Right if given by Will—Lost if Terms not strictly complied with. 10. Trustee—Under Contract has a Right to make Professional Charges. 11. Vendor and Purchaser—Mortgage to secure the replacing of Stock—Trustees receiving Money instead of Stock. 12. Vendor and Purchaser—

Specific Performance—Directors obtaining a private Benefit on a Purchase—Fraud—Trustees. 13. Waste—Injunction to restrain Party in Possession from committing, by stripping Estate of Timber—The Plaintiff having taken Proceedings to recover the Estate by Ejectment.

1. CLEMENTS v. HALL. 2 De Gex & Jo., 173.

Acquiescence—Partnership—Mines—Renewal of Lease by one Partner.

Walter Hall and Alfred Hall worked a mine in partnership, under a lease which expired in 1845, and then as tenants from year to year, till 1847, when Walter Hall died, leaving a will, by which he appointed his sister, Matilda Hall, executrix; and he gave his son, H. F. Hall, a share in the mine. After the death of Walter Hall, Alfred Hall remained in possession, claiming to be solely entitled to the mine and plant; and, although Matilda Hall made frequent applications to him for an account, he refused to render any. In 1850, notice to quit in March 1851 was served by the landlord on Alfred Hall, who, about the latter period, agreed with the landlord for a new tenancy of the greater part of the mine, on terms much more burdensome than those of the old tenancy. At the death of Walter Hall the mine was barely kept going, and was producing no profits; and things had remained in much the same state till March 1851. No notice was given to Matilda Hall of the negotiation for the new tenancy under which Alfred Hall remained in possession, and incurred a considerable outlay. In November 1851, H. F. Hall filed a bill against Matilda Hall and Alfred Hall, to establish his title to an interest in the mine. Matilda Hall put in an answer, admitting his title; Alfred Hall did not answer, but obtained an order for security for costs, and the suit was not further prosecuted. Alfred Hall died intestate in December 1853, and Matilda Hall became his personal representative. The plaintiff, in 1854, took an assignment of the interest of H. F. Hall, and filed his bill in the nature of a supplemented bill to the former bill, to have the interest of Walter Hall in the mine secured for his benefit. It was held by Lord Cranworth, C., and Lord Justice Turner (Lord Justice Knight Bruce *dubitante*), that the equity of the persons, claiming under Walter Hall to have the benefit of the renewal by Alfred Hall, was not displaced, and that the estate of Walter Hall had a continuing interest in the mine. "The general rule of law," said Lord Cranworth, C., "is, that on the death of a partner, in the absence of express stipulation, his representative is entitled to have the whole concern wound up and disposed of; and if the surviving partner continues the trade, the representative of the deceased partner may elect to take his

share of the profits, or may charge the survivor with interest on the amount of the capital retained and used by him. If the property of the partnership consists in part of leaseholds, the representative of the deceased partner may treat the survivor as a trustee, and, if the survivor renews the lease, he is considered to do so for the benefit of the partnership. This rule, however, has been to some extent departed from where the trade is one of a speculative character, and requiring great outlay with uncertain returns. There, if the surviving partner renews the lease in his own sole name, and carries on the business with his own capital and in his own name, the Court will not in general assist the representative of the deceased partner, unless he comes forward promptly, and is ready to contribute a due proportion of money for the benefit of the business. It would be unjust to permit the executor of the deceased partner to lie by and remain passive, while the survivor is incurring all the risk of loss, and only to claim to participate after the affairs have turned out to be prosperous. This is the general principle, which is clear enough, but the application of it to particular cases is often difficult. . . . Now, though I accede to the proposition, that the representative of a deceased partner in a mining concern may forfeit his right to the profit made by subsequent workings of a new lease taken by the survivor, if he does not with reasonable expedition come forward and contribute to the outlay, yet this doctrine can never apply to a case where the survivor keeps the representative of the deceased partner in ignorance of the real state of the concern. He is bound to disclose *uberrimâ fide* every fact which may enable the representative to exercise a sound discretion as to the course he ought to pursue. And here the defendant states, that Alfred, up to a period long subsequent to his obtaining the renewed lease, refused to furnish her with any accounts of the mine, and so kept her in ignorance of all which might be necessary for enabling her to decide on the propriety of insisting on her equitable right to be treated as a partner."

2. COPE V. DOHERTY. 4 K. & J., 367.

Collision between Foreign Ships—Merchant Shipping Act, 1854 (17 & 18 Vict., c. 104)—Foreign Law.

By the Merchant Shipping Act, 1854, Part 9, sec. 504, "no owner of any sea-going ship or share therein, shall in cases where, without his actual fault or privity, any loss or damage is, by reason of any improper navigation of such sea-going ship, caused to any other ship or boat, or to any goods, merchandise, or other things

whatsoever, on board any other ship or boat, be answerable in damages to an extent beyond the value of his ship, and the freight due, and to grow due in respect of such ship during the voyage, which at the time of the happening of such event is in prosecution, or contracted for." In the above-mentioned case it was held by Sir W. Page Wood, V. C., that the limitation of liability thus provided for a shipowner, did not apply to a case of collision between two American ships upon the high seas. "I decide this case," said his Honour, "entirely upon those general principles which, to my mind, render it proper for every court of judicature, in construing the enactments of any legislature, to presume *prima facie*, and, unless the contrary be expressed, or be implied from the absolute necessity of the case, that such legislature intended by its enactments to regulate the rights which should subsist between its own subjects, and not in any way to affect the rights of foreigners, whether by way of restricting or augmenting their natural rights. In construing our own statutes, no other rule can be a sound rule to adopt, unless it be clear, from the absolute necessity of the case, that the legislature intended to affect the rights of foreigners. I find no such necessity in the act before me, either in the 'saving clause,' which I have discussed, or in any other part of the act. I find nothing in the act to show that the legislature intended by the part of the act now in question—the ninth part of the act—either to restrict or enlarge the rights of any foreigners in respect of matters occurring out of its jurisdiction, even in a question between a foreigner and one of our own subjects, still less in a question between two foreigners; and I hold further, the *lex fori* cannot be applicable to a case like the present, inasmuch as the section in question relates not to the form of judicial procedure, but to the very substance of the matter in respect of which such procedure is to take place. The whole section is founded upon a particular species of legal contract, which cannot be imposed by our legislature as between its own subjects and foreigners not subject to its jurisdiction, still less as between two foreigners, whose rights must be governed by entirely different laws, as well as by different modes of procedure."

3. KIPPEN V. DARLEY. 3 Macqueen, 203.

Double Portions—Satisfaction—Scotch Law.

It was held in this case by the House of Lords (affirming the decision of the Court of Session in Scotland), *dissentiente* Lord Cranworth, that the presumption established in England against double portions, does not exist as a canon of construction in the

law of Scotland. "By the law of Scotland," said Lord Wensleydale, "a subsequent voluntary provision by a father given to a child, I conceive is, *primâ facie*, to be considered as not being a satisfaction of a former similar provision; there is no *primâ facie* presumption against double portions. But there is now established by the law of England what is said to be an artificial rule, founded upon a leaning against double portions, that where a parent gives a legacy to a child, not stating the purposes with reference to which he gives it, the court understands him as giving a portion; and if he afterwards advances a portion on the marriage of that child, it is to be deemed a satisfaction of the legacy (Pye Dubost, *ex parte*, 18 Ves., 140). This rule is now, by a long course of decisions, firmly and fully established, and cannot be disputed, and any comment upon it would be worse than useless. It by no means follows, however, that because it has been adopted by the courts in this part of the united kingdom, it must be followed in another part. This case depends entirely on Scotch law. I have made a careful examination of the several authorities referred to by the Lords of Session, in their full and elaborate judgments in the Court of Session, and quoted in the very able arguments at your lordships' bar, and I concur in the opinion of my noble and learned friend on the woolsack. I am not satisfied that there is any rule of the law of Scotland, that a settlement on a daughter by a marriage contract is presumed to be a satisfaction of previous provisions for children, unless those provisions are *ex obligatione*. There is certainly no decided case in which such a rule is laid down, where the testamentary provisions are voluntary; and I am not satisfied that the passages cited from Erskine (B. 3. t. 3. sec. 93), and other text-writers, which have been quoted, are any thing more than illustrations of the general rule, *debitor non præsumitur donare*."

4. PHIBBS v. COOPER. 7 Ir. Ch. Rep., 423.

Evidence—Admissibility of, in case of an Erasure in a Will.

A testator made a will in 1830, the draft of which purported to devise all his lands situate in several counties, among others in the county of Sligo, where the lands in the lease were situated, and "elsewhere in Ireland," to trustees, upon trust for his second son. Before the execution of the will, the testator drew his pen through the word "Sligo," without making it illegible. It was held by the Master of Rolls in Ireland, that evidence was not admissible to shew that he intended that the lands in Sligo should not pass by the will.

5. WALLER V. BARRET. 24 Beav., 413.

Executor—Indemnity against Covenants—Leaseholds—Administration.

A testator was, at the time of his death, assignee of a lease, in the assignment whereof he had covenanted to pay the rent, and perform the covenants in the original lease, and to indemnify the assignor against the rents and covenants. The testator had underlet the leaseholds at an improved rent. By an order in the suit the leaseholds were sold, and assigned to the purchasers, who covenanted, in the usual way, to indemnify the assignor and the estate of the testator against the rent and covenants in the original lease. It was held by Sir John Romilly, M.R., that the indemnity given by the respective purchasers, together with a recognizance to be entered into by the parties beneficially entitled to the estate, to refund as the court should direct, in the event of any claim being thereafter established against the testator's estate, or against his personal representatives, in respect of any contingent liabilities in respect of his leasehold estates, was a proper and sufficient indemnity against the said contingent liabilities; and that the executors could not retain or set apart any part of the testator's personal estate as an indemnity against such liabilities. "The only way," said his Honour, "in which the executors, or the testator's estate, could be affected, would be by an action brought by the ground landlord; and upon the facts of this case, it would be obviously more for his interest to eject the persons in possession, than to bring any action on the covenants. I am therefore of opinion, that the proposed indemnity is sufficient.

"I think it necessary to make one or two further observations. I wish to express the view which I take of these cases, in order not only that it may be clearly understood, but that, if it be wrong, my judgment may be set right in another place. The view I take of these cases is expressed in *Dean v. Allen* (20 Beav., 1), and which is this:—That where executors have fairly placed all the circumstances before the court, and act under its orders, they will be indemnified against all future liabilities. I will refer to one or two authorities on the subject, in order to make the grounds on which I proceed plain. In the first place, I hold this to be established by the authorities, that if breaches of covenant have been committed at the date of the decree, and the covenantee do not come in and prove under the decree, he will be barred of all remedy against the executors, and that the executors will be perfectly safe. It is the case of an existing debt, which the creditor does not come in and prove under the decree, and the court, having administered the assets, protects the executors against all future claims."

And, after an examination of the authorities upon this subject, his Honour adds, "This must be guarded against in my observations:—I do not mean to say, that where an executor is ordered to pay a sum of money in a suit which is not for the administration of the assets, it will protect him from the creditors. But I apprehend, that if, in a suit for the administration of assets, the court orders him to pay the money, that is a perfect security to him personally; for, unless that were so, it would paralyse the functions of this court. This court, in fact, acts on the same principle, with respect to non-existing debts, which may hereafter arise, as it would in the case of existing debts not proved. The indemnity given is only for the sake of affecting a security, in case the court sees a reasonable probability that a creditor, who is now unable to establish his case, may afterwards come forward. My opinion does not interfere with, but rather carries out, although in a different form, that which Lord Cottenham, in *Marsh v. Russell*, stated was the old practice.

"This being the view which I take of these cases, I have thought it desirable to state it, although it does not at all affect my judgment in this particular case, which proceeds on the facts. I think they afford a sufficient proof that the ground landlord would proceed by ejectment rather than by an action of covenant against the original lessee, by which alone this testator's assets could be affected."

6 RENDALL V. THE CRYSTAL PALACE COMPANY.

4 K. and J., 326.

Injunction—Forfeiture of Charter—Admission to the Crystal Palace on the Lord's Day.

The Crystal Palace Company obtained a royal charter of incorporation, on the condition "that no person should be admitted to the building or grounds of the Company on the Lord's day," in consideration of any money payment, whether made directly or indirectly, unless the express sanction of the legislature should have been obtained for admission on such consideration. The Company obtained an Act of Parliament, empowering their directors to agree with the proprietors of shares or stocks for the conversion thereof into a ticket of admission for such proprietor or his nominee for life or for years; but it was expressly provided that nothing therein contained should alter or invalidate the deed of settlement or charter, or should relieve the Company from any covenants or conditions contained therein respectively. The directors put advertisements in the newspapers, and issued circulars offering to accept the surrender of shares in exchange

for tickets of admission for a term limited, to be made out to bearer, and to be available for Sundays as well as ordinary days. Upon a bill being filed by a shareholder, Sir W. Page Wood, V.C., granted an injunction restraining the Company from accepting a surrender of any shares in exchange for tickets of admission, upon the ground that the admission of any person on the Lord's day, by means of such a ticket as proposed by the directors, might occasion the forfeiture of the Company's charter. "Whether," said his Honour, "the words 'money-payment, made directly or indirectly,' extended to all cases of money or money's worth; whether, for instance, they would reach the case of the presentation of a vase, or some other ornament for the palace, I will not stop to inquire; but if the directors proposed to take a transfer of a single share to themselves on behalf of the Company, and to admit the shareholder on the Lord's day, they would be clearly and distinctly receiving indirectly a money-payment. The share is not itself money, but it is immediately convertible, and saleable in the market at a certain price. It is given up in distinct terms, for the privilege of that admission; and it would be a very narrow construction of the charter to say that the prohibition is confined to admissions, in consideration of the payments made in actual cash, and does not extend to such as may be made in shares, not even (for the argument must go to that extent) in shares in the public funds, or the like."

7. KENNEDY v. DALY. 7 Ir. Ch. Rep., 445.

Interest on Charges—Tenant in Tail not Bound to keep down—Tenant for Life—Arrears.

By a marriage settlement, lands, of which the husband was tenant in tail, and a sum of stock, were vested in trustees, subject to several incumbrances, and the husband was made tenant for life. There was an arrear of interest due at the time of the settlement, and, under a power contained in the settlement, it was paid off by the sale of a portion of the stock. It was held by the Master of the Rolls of Ireland, that the husband was not bound to replace the stock so applied. "The petition," said his Honour, "is obviously framed on the erroneous assumption that the respondent Daly (being tenant for life under the settlement) was not only bound to keep down the interest which accrued after the date of the settlement, but the interest which accrued before the date of the settlement. That is an entire mistake. It is a well-established principle of equity, that an adult tenant in tail is not bound to keep down interest.—*Burgess v. Mawley* (1 Tur.

& Russ., 167.) The reason is obvious. A person who, by a disentailing deed, may make himself absolute owner of the estate, can be under no obligation to keep down interest on incumbrances. So, also, a tenant for life is not bound to pay interest accrued in the time of a previous tenant for life. The arrear accrued in the lifetime of the first tenant for life, would be a charge on the inheritance.—*Sharshaw v. Gibbs* (1 Kay, 339), *Caulfield v. Maguire* (2 J. & Lat., 160.) The marriage settlement of 1854 settled the estates subject to existing incumbrances; and subject therefore to the arrear of interest due thereon at the date of the settlement. I never heard before of the equity sought to be enforced in this suit—that the owner of an incumbered estate, who settles it on his marriage, by a settlement recited in the incumbrances, is bound to disencumber the estate.”

8. *TILDESLEY v. LODGE.* 3 Sm. and Giff., 543.

Notice—Binding upon a Purchaser if given before Payment of Purchase Money.

When notice of an incumbrance has been given to a purchaser before actual payment of the purchase money, even although it may have been secured, and a conveyance actually executed, such notice will be binding in the same manner as if it had been given before the contract to purchase. This proposition is well illustrated in the recent case of *Tildesley v. Lodge*. There the owner of a leasehold house mortgaged it to three persons successively, and then agreed to sell it subject to the first two incumbrances only. The purchaser paid for it by a cheque of his trading firm and took the assignment, but owing to certain misgivings he countermanded payment of the cheque, and then for the first time received notice of the existence of the third mortgage; being, however, threatened with a summons in bankruptcy, he withdrew his countermand, and the cheque was paid. It was held by Sir John Stuart, V.C., that as the purchaser had notice of the third incumbrance he was bound to redeem it.

9. *BROOKE v. GARROD.* 2 De G. and Jo., 62.

Pre-emption—Right of, given by Will—Lost, if Terms not strictly complied with.

The testator in this case, by his will directed his trustees to offer all his real estate to his brother Mallocks Garrod for £2500, to be paid to the trustees; but in case his brother should not within one calendar month after the testator's decease signify to the trustees his intention to accept, and take the premises at

the price aforesaid, or should not at the expiration of two calendar months from the time of signifying such his intention, pay the said sum of £2500 to the said trustees, then the testator directed the estate to be sold by auction. The brother within the month signified his intention to purchase, and asked for an abstract of the title. No abstract was furnished by the trustees, nor was the purchase-money paid, nor was any conveyance tendered on the part of Mallows Garrod. It was held by the Lord Chancellor (Lord Cranworth), affirming the decision of Sir W. Page Wood, V.C., that as the payment had not been made within the prescribed time, the right of pre-emption was gone. "I have," said his Lordship, "more than once had occasion to say, that I think this court has gone to too great an extent in departing from the precise terms of the contracts into which parties have entered, and so in effect making other contracts for them. If a contract can, by fair construction, be divided into two contracts, *i. e.*, one contract to do an act, and another to do it at a certain time, the court may say that these are independent stipulations. But if the contract be, that on payment of a sum of £1000 at or before a specified day, a certain act shall be done on my part, I am at a loss to see why I can properly be called on to do the act if the money be not paid at the day, or why I should be compelled to perform, not my contract, but another contract into which I have not entered. If cases are found in the books which go to that extent, I can only say that I cannot see the principle on which they are founded. No authority has, however, been produced, in which this court has varied the terms of a gift under which a benefit is to be taken. The rule there is, *ujus est dare ejus est disponere*; and if the donor choose to say that, in the event of a person paying £2500 on or before a specified day, the gift shall take effect, I do not see how the court, if the money is not paid on or before the day, can take any thing as an equivalent for the payment at the prescribed time."

10. DOUGLAS V. ARCHBUTT. 2 De G. & Jo., 148.

Trustee—Under a Contract has a Right to make Professional Charges.

Although as a general rule, very strictly observed by Courts of Equity, a trustee will not be allowed to derive a profit from his trust, by making professional charges for any thing which he has done in the execution of the trust, still he may contract with his *cestuique* trust that he shall be remunerated for his professional services.

In the above-mentioned case of *Douglas v. Archbutt*, property was assigned by Archbutt to the plaintiff Douglas (who was known to be an auctioneer, though not described in the deed as such), upon trust, to sell by public auction or private contract, and out of the sale monies to pay the costs, charges, and expense of preparing for, making, and completing such sales, "*including the usual auctioneer's commission.*" It was held by the Lords Justices, affirming the decree of Sir John Romilly, M.R., that the plaintiff, if he acted as auctioneer at the sale, could retain his own commission. "It was known to Archbutt," said Lord Justice Turner, "at the time of his executing the deed, that the plaintiff carried on business as an auctioneer. The deed contains directions that the plaintiff shall sell by public auction or private contract, and shall apply the monies to arise from the sale, in the first place, in payment of costs, charges, and expenses of the deed, 'and of preparing for, making, and completing such sales, including the usual auctioneer's commission, and otherwise, incidental to the aforesaid trusts.' The deed, therefore, contemplates a sale by auction. If the words, 'including the usual auctioneer's commission,' had not been inserted, it would have been competent to the plaintiff under the other words to charge any auctioneer's commission paid by him. These words, therefore, were not wanted for that purpose; and for what purpose can they have been inserted, but to authorize the plaintiff to charge auctioneer's commission if he himself acted as auctioneer?"

11. *PELL V. DE WINTON.* 2 De G. & Jo., 13.

Vendor and Purchaser—Mortgage to secure the Replacing of Stock—Trustees receiving Money instead of Stock.

A mortgage was made for securing the re-transfer of a sum of stock to the trustees of a will. Afterwards, on the marriage of one of the *cestuique* trusts, his third share in the stock was vested in trustees who had power to give receipts, to invest in government or real securities, and to vary investments. Part of the mortgaged estate was afterwards sold for less than the value of the stock lent, and one-third of the price was paid in *cash* to the trustees of the settlement. On a subsequent sale of that part of the estate, the purchaser took the objection, that the trustees of the settlement had no right to receive the share to which their *cestuique* trusts were entitled, otherwise than in stock, and that, as the share was paid in cash, the vendor was bound to show that the cash had been properly invested. Lord Cranworth, C., affirming the decision of Sir John Stuart, V. C., held that the

purchaser's objection was well founded—"The proviso in the mortgage deed," said his Lordship, "was for the re-transfer of the stock, and the powers to give receipts, which are contained in the settlements, can only be construed to extend to what the trustees of those settlements were authorized to receive. There is, it is true, much force in the argument, that the trustees, having a power to vary securities, might properly have converted the stock into money, and that they therefore must be authorized to receive it as money instead of stock; and, had there been contained in the purchase-deed a recital, that the trustees of the settlements were about to invest the money on real security, I should have been loth to say that every thing of substance had not been complied with, and that their receipts were not sufficient discharges; for in that case, it might properly have been assumed that they had, in the *bond fide* exercise of their discretion, received money instead of stock, so as to effect the investment on real security more conveniently and with less expense; but, in the absence of any thing to show that the trustees were exercising a discretion, or were intending to invest in securities of a different description, I am of opinion that it cannot be held that they were acting properly in receiving money instead of stock. The objection therefore, though somewhat refined, is in my opinion well founded, and the appeal must be dismissed with costs."

12. MAXWELL V. THE PORT TENNANT PATENT STEAM FUEL
AND COAL COMPANY. 25 Beav., 495.

Vendor and Purchaser—Specific Performance—Directors obtaining a Private Benefit in a Purchase—Fraud—Trustees.

It is a well known rule in equity, that a person in a judiciary position shall not be allowed to profit by reason or on account of his trust. In general, any transaction in which a trustee has transgressed this rule can, at the option of the fiduciaries, be set aside; *a fortiori* when trustees call upon the court to enforce the specific performance of a contract in which they have attempted to profit by their trust, will their application be refused, as it is in fact asking the court to assist them in completing a breach of trust. In the above-mentioned case, the plaintiff, Maxwell, agreed to sell a colliery to a joint-stock company for £8000, in paid-up shares; but there was a private arrangement, *not communicated to the shareholders*, that £2500 of these should be given as a bonus to the directors and trustees of the company. It was held by Sir John Romilly, M.R., that the plaintiff was not

entitled to the specific performance of such a contract. "The ground," said his Honour, "on which my decision proceeds, is this:—There was a private arrangement between them, that the directors should obtain a personal benefit by the transaction, and, as this was not communicated to the shareholders, they cannot be bound by the contract. The directors are persons who are entrusted to manage the affairs and carry into effect the contracts of a company for the shareholders, who place implicit reliance on them. If, therefore, in their dealings on behalf of the company, any thing occurs by which the directors gain a private advantage for themselves, it ought to be communicated to the body of shareholders; and all persons must be held to be cognizant of this principle.

"The plaintiff, who was a party to this arrangement, must be treated as being also aware that no contract, of which such an arrangement formed a part, could bind the shareholders until communicated to them.

"This is also confirmatory of the fact, that the individual interests of the directors was a leading motive for entering into the contract; they seem to have taken no pains to examine into the value of the mine before they agreed to pay this sum for its purchase. It was their duty to do so, and to ascertain whether the sum proposed to be given was a fair price to be paid by the company for the mine; but, in truth, the worth of the mine was to be paid to the plaintiff, and the residue of the £8000 was to be divided between the directors."

13. NEALE V. CRIPPS. 1 K. & J., 472

Waste—Injunction to restrain Party in Possession from committing, by stripping Estate of Timber—the Plaintiff having taken Proceedings to recover the Estate by Ejectment.

In this case the plaintiff had proceeded against the defendant to recover an estate by means of an ejectment, and in the meantime it appeared from an affidavit filed by the plaintiff, that the defendant had been cutting down the timber upon the estate to such an extent as nearly to strip the land of all trees, and timber-like trees of any value, and that he had cut down the said timber, and was proceeding to cut down the remainder thereof, for the express purpose of wasting the value of the property of the plaintiff in the estate, and with the attempt to defraud him; inasmuch as the way in which the said timber was cut was so destructive, that it could not be referred to any fair act of ownership. Sir W. Page Wood, V. C., upon the application of

the plaintiff, granted an interim injunction restraining the defendant from cutting down any timber, or timber-like trees, standing or growing on the estate; and from removing therefrom or disposing of any timber or timber-like trees, which had already been cut, and from committing any other waste on the estate, and for an account; and upon the defendant not appearing, according to the terms of the notice of motion, the injunction was extended until the hearing or further order.

II.—POINTS DETERMINED IN THE COURTS OF COMMON LAW.

COURTS.	REPORTS.
Queen's Bench	8 Ellis and Bl., Part 1.
Common Pleas	{ 3 Common Bench, N. S., Parts 2 & 3.
Exchequer	{ 3 Exchequer, Hurlst. and Norman, Part 2.

1. Legality of Second Distress caused by Wrongful Conduct of Distrainee. 2. Measure of Damages under Lord Campbell's Act (9 & 10 Vict., c. 93). 3. Abandonment of Right to Ancient Lights. 4. Life Policy—Stat. 14 Geo. III., c. 48. 5. Reference to Master—Stat. 17 & 18 Vict., c. 125, s. 3. 6. Cheque—Delay in Presentment of. 7. Right of Appeal to House of Lords—Stat. 17 & 18 Vict., c. 125. 8. Interrogatories—C. L. Proc. Act, 1854, s. 51. 9. Waiver—Writ of Summons. 10. Bailiff of County Court—Protection afforded by Stat. 9 & 10 Vict., c. 95, s. 138. 11. Action on Joint and Several Bond—Staying Proceedings. 12. Challenge of Juror by the Crown—When it may be made.

1. LEE v. COOKE. 3 H. & N., 203.

Legality of Second Distress caused by Wrongful Conduct of Distrainee.

The maxim of our law is well established—*nemo debet bis vexari pro una et eadem causa*, and in accordance with it a landlord cannot in general legally distrain twice in respect of the same rent—under special circumstances, however, he may be justified in doing so (Broom's Leg. Max., 3rd ed. pp. 313, 314); *ex. gr.* if the tenant, by his own violence and misconduct, prevent the landlord from taking away and realizing the first distress.

In the case cited *supra*, a haystack had in the first instance been distrained and sold under the distress—the purchaser, nevertheless, being forcibly prevented from removing it by the distrainee. It was held that the last-named party could not complain of a distress *pro eadem causâ* subsequently levied upon him.

2. FRANKLIN V. THE SOUTH EASTERN RAILWAY COMPANY.

3 H. & N., 211.

Measure of Damages under Lord Campbell's Act (9 & 10 Vict., c. 93.)

The rule for adjusting the measure of damages under Lord Campbell's Act, is thus discussed and stated by L. C. B. Pollock in the above case :—

"The statute," he remarks, "does not in terms say on what principle the action it gives is to be maintainable, nor on what principle the damages are to be assessed; and the only way to ascertain what it *does* is to shew what it *does not* mean. Now it is clear that damage must be shewn, for the jury are to give such damages as they think proportioned to the injury. It has been held that these damages are not to be given as a *solatium*, but are to be given in reference to a pecuniary loss.—*Blake v. The Midland Railway Company*, 18 Q. B., 93. That case was tried before Parke, B., who told the jury that the Lord Chief Baron had frequently ruled at *Nisi Prius*, and without objection, that the claim for damage must be founded on pecuniary loss, actual or expected, and that mere injury to feelings could not be considered. It is also clear that the damages are not to be given merely in reference to the loss of a legal right, for they are to be distributed among relations only, and not to all individuals sustaining such a loss; and accordingly the practice has not been to ascertain what benefit could have been enforced by the claimants had the deceased lived, and give damages limited thereby. If, then, the damages are not to be calculated on either of these principles, nothing remains except they should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life."

5. STOKOE V. SINGERS. 8 EIL. & BL., 31.

Abandonment of Right to Ancient Lights.

In this case a question, as to the right of the enjoyment of ancient lights, arose between the parties to the record, under the following circumstances :—A. was the owner of a house in which

were ancient windows, which had been blocked up by A.'s predecessor, and had so remained for nearly twenty years. B., having purchased land adjoining A.'s house, proposed to build upon it. A., by way of asserting his right to the light, reopened his ancient windows, which B. obstructed. A. having brought his action against B. for this obstruction, the question arose whether there had been an abandonment of the right to light and air through the windows thus obstructed, or whether such right, having once existed, had been lost in any other manner. At the trial of the cause before Martin, B., that learned judge told the jury that there were various ways in which the right in litigation might be lost. He stated that it might be so by an abandonment, and that closing the windows, with the intention of never reopening them, would constitute an abandonment destructive of the right, but that closing them for a temporary purpose merely, would not in law have the like effect. The judge further stated, that though the person entitled to the light might not really have abandoned it, yet if he manifested such an appearance of having abandoned it, as to induce the owner of the adjoining land to alter his position in the reasonable belief that the light was abandoned, the party entitled would be precluded as against such last-named individual from setting up the right. The mode thus adopted of presenting the case to the jury, was held by the court *in banc* to have been substantially correct.

4. HODSON V. THE OBSERVER LIFE ASSURANCE SOCIETY.

8. Ell. & Bl., 40.

Life Policy—Stat. 14. Geo. III. c. 48.

The point here decided may be thus shortly stated, that under the 2nd section of the stat. 14 Geo. III. c. 48, where a policy is effected on the life of another, the name of the person interested therein must be inserted in the policy, at the time of making it, as that of the person interested, otherwise the policy will be void.

5. INSULL V. MOOJEN. 3 Com. Bench (N. S.), 359.

Reference to Master—Stat. 17 & 18 Vict., c. 125, s. 3.

Where a reference is made to the Master, by Judge's order, under the above section of C. L. Proc. Act, 1854, it is incumbent on him to proceed with the inquiry, even though a question of fraud should incidentally arise in the course of it; for (*per Willes, J.*), the order being made, it is the duty of the arbitrator, or the Master, to proceed to act upon it, and not to canvass the propriety of the order. "That clearly is no part of his duty."

LAWS v. RAND. 3 Com. Bench (N. S.), 442.

Cheque—Delay in Presentment of.

This case affirms a point decided in *Robinson v. Hawksford*, 9 Q. B., 52 (see *per* Patteson J.), that as between the drawer and holder of a cheque, no delay in presenting it of less than six years, will be unreasonable, unless some loss be caused by the delay.

7. HICKMAN v. COX. 3 Com. Bench, (N. S.), 523.

Appeal to House of Lords,—Stat. 17 & 18 Vict., c. 125.

On appeal from the court of C. P. to the Exchequer Chamber, the judges of this latter court were equally divided in opinion. Held that there was a sufficient affirmance of the judgment of the court below, to justify an appeal under the provisions of the above statute to the House of Lords.

8. ADAMS v. LLOYD. 3 H. & N., 351.

Interrogatories—C. L. Proc. Act., 1854, s. 51.

If to an interrogatory, under the statutory provision above specified, as to whether the defendant has in his possession any deeds or writings relating to the land which he is charged with wrongfully breaking and entering, the party interrogated answers by affidavit that he has, but that such deeds relate exclusively to his own title to the lands, and do not shew any title in the plaintiff, such answer to the interrogatory will suffice.

In this case Pollock, C. B., intimates his adhesion to the remarks of Maule, J., in *Fisher v. Ronalds*, 12 C. B., 762, bearing on the well-known maxim *nemo tenetur seipsum accusare* (Broom's Leg. Max., 3rd. ed., p. 871. *et seq.*), that it is the witness who is to exercise his discretion as to answering, or declining to answer, a question tending to criminate him, not the judge, and the L. C. B. takes occasion to adopt the proposition following, which had been advocated on behalf of the plaintiff in the case before the court:—"That if a plaintiff or defendant has deeds in his possession, and says that they do not relate to the title of the opposite party, but solely to his own, then the opposite party has no right to say, 'I should like to be satisfied of the fact myself; I doubt whether you entertain a correct view of the meaning of the documents, or are quite honest in your representation of their nature;' for, if the information respecting them can be obtained, the mischief is done—the opposite party would acquire some

knowledge which he is not entitled to. Moreover, the answer might enable some one else to take proceedings, and thus a person might lose his estate ;” and Bramwell, B, added, “ I have always thought that the right to administer interrogatories was confined to those matters in respect of which the party might have a discovery.”

9. *BAYNE v. SLACK.* 3 Com. Bench (N. S.), 363.

Waiver—Writ of Summons.

A writ of summons was issued under the stat. 15 & 16 Vict. c. 76, s. 18, and on the 17th of September was served upon the defendant, being a British subject residing out of the jurisdiction. On October 27th, the plaintiff obtained an order for leave to proceed, the affidavit upon which such order was obtained being, however, insufficient ; on the following day (October 28th), the plaintiff filed a declaration, which was taken out of the office by the defendant's attorney ; subsequently a rule was obtained calling upon the plaintiff to shew cause why the writ of summons, the order, and all subsequent proceedings, should not be set aside for irregularity. This rule, however, was discharged, the case being held to fall within the operation of the general rule, that “ taking a step with knowledge, or the means of knowledge, of a previous irregularity, operates as a waiver.”

10. *BURLING v. HARLEY.* 3 H. & N., 271.

Bailiff of County Court—Protection afforded to, by Stat. 9 & 10 Vict., c. 95, s. 138.

By the statutory provision above cited, it is enacted, “ for the protection of persons acting in the execution of the Act,” that all actions and prosecutions to be commenced against any person, for any thing done “ in pursuance of ” the Act, “ shall be laid and tried in the county where the fact was committed, and shall be commenced within three calendar months after the fact committed,” &c. The bailiff of a county court, who, acting *bonâ fide*, seized by mistake the goods of one person under a county court execution directed against another person, was, in this case, held entitled to the protection of the 138th section of the original County Courts Act, the rule bearing upon this subject being, that when the defendant *bonâ fide* believes he is acting in pursuance of a particular statute, “ but in so doing is guilty of a trespass, or excess, or has acted erroneously, he is, notwithstanding, entitled

to the benefit of such protecting clause (as that occurring in the County Courts Act), whether such trespass or wrongful act be in respect of *place, or time, or person, or in circumstances.*"

11. **WHEELHOUSE V. LADBROOKE** 3 H. & N., Exch. Rep., 291.

Action on Joint and Several Bond—Staying Proceedings.

"Application to the equitable jurisdiction of a court of law, is where the court is asked to do in a summary way something which would otherwise have been done in the ordinary way" (*per* Bramwell, B., 3 H. & N., 293); the court, however, will not interfere to stay the proceedings in an action merely on the ground of hardship or oppression, and thus "deprive a party of his legal right."

In *Wheelhouse v. Ladbroke* the action was brought on two joint and several bonds, each in the penal sum of £40,000, and conditioned for payment of £20,000 and interest, at the expiration of six months after notice in writing demanding payment, and, until such notice, for payment of interest at the rate of five per cent. on the usual quarter-days. Default having been made in payment of the quarter's interest, due March 25, the plaintiff, on the 8th of April, gave a written notice requiring payment of the principal, and on the following day commenced this and four other actions against the obligors. The court refused to stay proceedings on payment of the interest due and costs, or until the expiration of the notice requiring payment, on the ground that they had no jurisdiction to interfere.

12. **MANSELL V. THE QUEEN.** 8 Ell. & Bl., 54.

Challenge of Juror by the Crown—When it may be made.

The principal points determined in this case will sufficiently appear from the judgment delivered by Cockburn, C. J., in the Exchequer Chamber, upon a writ of error brought to reverse a judgment of the Court of Queen's Bench. Sentence of death having been passed upon the prisoner, who had been tried for murder, and convicted at the Kent Winter Assizes 1856, he was eventually executed in pursuance thereof.

"The first objection," remarked the learned Chief Justice, "is this. It appears that, after the list of jurors had been gone through, and after several persons on answering to their names had been set aside by the Crown, twelve of the persons on the

panel came into court. The names of those twelve had previously been passed over, it being known that they had retired as a jury. At this time the name of Iremonger, the first of those who had been ordered to stand aside, had been called a second time, with a view to seeing if the Crown would challenge him for cause; and he had answered. Instead of proceeding at once to try whether the Crown would challenge Iremonger for cause, the judge, on the application of the counsel for the Crown, ordered him to stand aside until the names of the twelve who had just come into court were called. The question, whether this was right or not, depends upon the construction of stat. 6 Geo. IV. c. 50, s. 29, repealing and re-enacting 4 stat. 33 Ed. I. It appears that, before 4 stat. 33 Ed. I., the Crown, either by prerogative or by usurpation, exercised the power of peremptory challenge without restriction as to number: and, if that power was exercised so that twelve jurors did not remain, the inquest went off for that cause. To meet this evil the act was passed. On the enactment a practice was grafted by which, on the counsel for the Crown intimating his intention to challenge one of the jurors, he was not put to assign cause at once, but the juror was set aside until the panel was gone through, to ascertain if enough of persons not objected to might not be found to make a jury. If the panel was large, this in effect was equivalent to a peremptory challenge. In one of the early state trials (Fitzharris's case, 8 How. St. Tr., 243, 335), the Chief Justice uses language as if, in practice at that time, this privilege was not confined to the Crown, but that either side might set aside the juror, and afterwards take their exceptions. But be that as it may, it must be admitted by every one, that it is now settled by overwhelming authority, that where it is proposed to object to a juror, the counsel for the Crown have the right to have the man set aside until it is seen if, without him, there will be jurors enough to try the prisoner, and that it is not until the panel is gone through that cause need be shewn. That being so, the question is reduced to this: When is the panel gone through? Is it as soon as the names have been called over? Or is it not until every proper attempt has been made to secure the presence of those on the panel whose duty it is to attend? In the present case the panel had been called over properly, omitting the names of twelve who were known to be justifiably absent, the calling of whose names would have been an idle ceremony, and enough persons did not remain to form a jury. Iremonger's name is again called; and, before any thing more is done, the twelve absent jurymen come in. It is not disputed that they were duly qualified jurymen, and on the list; but it is contended that, the list having been once gone through, it must

be gone through again in the same order as before. But it being conceded that the Crown is not put to shew cause for its challenge till the panel is gone through, it seems to me very clear that the panel was not gone through till those twelve names of available jurymen were called. It is, however, said that Iremonger having been called, his challenge should have been disposed of before these names were called. There would have been some difficulty about this if the challenging had been commenced, as if some previous challenge for cause had been tried, though even then I do not think there would have been a matter of right. But here it is clear that no challenge had begun, and before the Crown could be put to challenge and shew cause, the names of all the defaulters should have been called over. Independently of the reason there is high authority for that."

In this case, accordingly, the judgment of the court below was affirmed, and, as above stated, the prisoner was subsequently executed.

Short Notes of New Books.

[*.* All Law Books and works of interest to the Legal Profession, forwarded to the Editor of the *LAW MAGAZINE* and *LAW REVIEW*, will be noticed—either shortly, or at length—in its pages.]

An Analytical Digest of the Laws of the United States, from the Adoption of the Constitution to the end of the Thirty-Fourth Congress. By Fred. C. Brightly, Esq., of the Philadelphia Bar. London : Kay & Brother, 1858.

THIS work would seem to be indispensable to a practising lawyer in the United States ; its nature, however, precludes us from reviewing it at length. In upwards of one thousand pages are here presented to us the laws of that country whose jurisprudence has been mainly borrowed from our own, and whose judges are not second to those administering justice in our tribunals. We can but briefly state the plan here adopted by the author, and this may most satisfactorily be done in the words which he has himself used. "The text," Mr. Brightly informs his readers, "is given in the words of the Statute Book. The matter is arranged alphabetically and analytically. And the notes include the decisions of all the Courts, both State and Federal, in which the construction of the statute law of the United States has been the subject of adjudication, as well as those of the heads of the executive departments."

Would that we, denizens of the mother country, had a Digest of our own Statute Law, with the decisions equally well annotated in a like compass ! This hope, we fear, however, until a Code be in existence, will scarce be realized.

An Examination of the Rules of Law respecting the Admission of Extrinsic Evidence in aid of the Interpretation of Wills, by the Right Hon. Sir James Wigram, 4th Ed. By W. Knox Wigram, M.A., of Lincoln's Inn, Barrister-at-Law. London : Butterworths. 1858.

To a thorough examination of this new edition of Sir James Wigram's well-known Treatise on the admissibility of extrinsic evidence to aid in the interpretation of wills, the space which can be afforded in this portion of our Magazine would manifestly be inadequate. For testing,

moreover, the accuracy of a work like that before us, so far as regards the new matter introduced into it, and the modifications of views formerly put forth, promiscuous reference is better adapted than continuous perusal, and when we have had opportunities of thus referring to it, we shall place before our readers the conclusion at which we may arrive. We notice, however, in the preface to this (fourth) edition of the Vice-Chancellor's work, one statement which strikes us as somewhat unsatisfactory; it seems that the present editor has not been permitted to *alter* or *displace* the original text—merely to make additions thereto, or to the foot-notes. We can scarcely understand why—confidence being felt in an editor—he should not be invested with full powers to *revise*, in every sense of that word, his author's text, or why the limits of his responsibility should be indicated by brackets scattered over the page, which offend the eye of a reader, and, still more, make one suspect that there is something wrong in the mode in which the work thus defaced has been prepared.

As to the genuine merits of this edition of Sir James Wigram's standard work, we must, for the reason above stated, reserve our opinion for the present.

First Report of the Commissioners of the Code. State of New York.

Albany: Weed, Parsons, & Co., Printers to the State Departments.
1858.

By an Act of the Legislature of the State of New York, passed on the 6th April, 1857, Messrs. David Dudley Field, William Curtis Noyes, and Alexander W. Bradford, were appointed commissioners, whose duty, in the words of the Act, was thus defined:—"It shall be to reduce into a written and systematic Code the whole body of the law of this state, or so much and such parts thereof as shall seem to them practicable and expedient, excepting always such portions of the law as have been already reported upon by the commissioners of practice and pleadings, or are embraced within the scope of their reports." By the Act specified, the commissioners were further required to "divide their work into three portions; one containing the political code, another the civil code, and a third the penal code. The political code must embrace the laws respecting the government of the state, its civil polity, the functions of its public officers, and the political rights and duties of its citizens; the civil code must embrace the laws of personal rights and relations, of property, and of obligations; the penal code must define all the crimes for which persons can be punished, and the punishment for the same. But no portion of either of said codes shall embrace the courts of justice, the functions or duties of judicial officers, nor any provisions concerning actions or special proceedings, civil or criminal, or the law of evidence." The first report of the commissioners thus appointed and charged with most onerous duties, for which they are to "*receive no compensation whatever*," is now before us. It presents a general analysis of the codes political,

civil, and penal, above enumerated, which may, and we think assuredly will, be of essential service to those who are at some future epoch to be the codifiers of our own law. With this analysis, extending over more than one hundred pages, we cannot of course present our readers—many of them, doubtless, have ere now examined it. The analysis, however, is prefaced by some ably and succinctly written paragraphs, from amongst which we select the following as peculiarly deserving of attention from our lawyers at the present moment. It will be observed that the necessity of *amending* as well as digesting and codifying, is in the extract subjoined distinctly recognized. We have ourselves long been converts to the views thus presented by Mr. Field and his very learned colleagues:—

“How far, in the preparation of a Code, changes should be recommended, is a question of much delicacy. They should, without doubt, be cautiously admitted. Law is the growth of time and circumstance. An original system of jurisprudence, founded upon mere theory, without reference to national characteristics, habits, traditions, and usages, would be a failure. The science of government and law is progressive; new regulations spring from necessity, or are suggested by experience, and the application of the rules of justice to human affairs is constantly modified by the changing circumstances of society. The process is easily understood. In the earlier stages of civilization, when communities are small and isolated, local customs are more distinct, in conformity with local character; but as cultivation and intercourse gradually break down provincial peculiarities, and eradicate partial customs, the tendency to assimilation enables the legislator to disregard inconvenient rules, venerable only from age and habit, and gradually to introduce changes which have the experience of other communities to recommend them, and which seem better adapted to an advanced civilization. We thus reach a stage in which valuable improvements may be borrowed from other systems and engrafted into our own, without impairing the harmony of our laws by the introduction of unsuitable elements. For example, the law of special or limited partnerships, the offspring of the commerce of the middle ages, unknown to the common law, has within a recent period been adopted into our own legislation, with manifest advantage. So we have also seen the influence of our jurisprudence reflected back upon the country from which we derived our language and our laws; and reforms, readily admitted by our plastic legislation, slowly adopted there, after having been tested by our experience; though the settled constitution and the fixed habits of England might have prevented their origination in that country.

“Thus two great purposes are to be subserved in revising the jurisprudence of a nation; one, the reduction of existing laws into a more accessible form, resolving doubts, removing vexed questions, and abolishing useless distinctions; the other, the introduction of such modifications as are plainly indicated by our own judgment or the experience of others. We are satisfied that this work should be performed with delicacy, caution, and discrimination; that nothing should

be touched from the mere desire of change, or without great probability of solid advantage.

"A Code of all the law of a commercial and opulent people can only be made after the most patient study and incessant toil. A superficial observer might, perhaps, suppose a year or two of labour sufficient for it; but he who reflects upon the infinite variety of human affairs, and that the law aims to furnish a rule for every known relation and every foreseen transaction, knows how idle it is to expect it to be hastily, if it be faithfully, performed. The task should seem, indeed, to be hopeless, if it were designed to provide an express rule for every case which can possibly present itself for judicial decision. It is of course impossible to foresee all the questions which will arise in the future, or to collect and arrange all those which have arisen and been solved, so as to meet every contingency in human affairs, by a definite legal rule. That which in the judgment of the Commissioners can reasonably be attempted, is to collect, condense, and arrange those general and comprehensive rules of action, resting upon fundamental principles, recognized by the law or by reason, which will afford, as far as possible, a guide in regard to the rights of person and of property. There should be neither a generalization too vague, nor a particularity too minute, in the Code of an enlightened and free people, whose intelligence demands that the law should be written, and brought within the knowledge of all, and whose liberty requires that no greater restraints be imposed upon their action than policy and necessity dictate. While, therefore, the Commissioners are duly sensible of the importance of having the work done with all reasonable despatch, and of the pressing need of some portions of it at the present time, they are also aware of the necessity of proceeding with deliberation, and submitting no portion till it has been carefully considered. Not only must each part be prepared with care, but its relations to the other parts must be examined before it can prudently be admitted."

A Concise and Easy System of Book-keeping for Solicitors, &c. By William Mackenzie, Solicitor. London: Law Times Office, 1858.

WE commend this System of Book-keeping to those for whose special use it is designed, with this single observation, that the means here suggested for the methodical registering of accounts, appear to us well adapted for the end in view. This work, we understand, has been prepared by one who has had many years' experience, as well in Scotland as in England, bearing on the subject of which it treats. The prefatory remarks should certainly be perused by every solicitor and articled clerk.

1. **The Law relating to the Public Health and Local Government, in relation to Sanitary and other Matters.** By William Cunningham Glen, of the Middle Temple. Barrister-at-Law. Also, by the same Author,

2. The Law relating to the Removal of Nuisances injurious to Health, and to the Prevention of Epidemic, Endemic, and Contagious Diseases.
3. The Local Government Act, 1858, with Notes, &c. By S. B. Bristowe, Esq., of the Inner Temple, Barrister-at-Law.
London : Butterworths, 1858.

THE publishers of the works above enumerated have, we think, done good service to the profession and the public, in putting them forward at the present moment. "The sanitary condition of the people," remarks Mr. Glen in his preface to the volume on Public Health and Local Government, "is a subject which all must look upon as of the first importance to the well-being of the nation ; for it is certain that there can be no more efficacious means of stopping the progress of epidemic, endemic, and contagious diseases, than by attending to the drainage and sanitary condition of towns." This remark, we say, has just now special force and pertinency. Any one who had the good fortune to attend the recent meeting, at Liverpool, of the Social Science Association, must have heard, and doubtless have since reflected, on the proposition, urged so eloquently and truthfully by Lord Shaftesbury—That the moral condition of the working classes is connected intimately with their physical condition, which last of course depends on the working of our sanitary laws, and on the carrying out of sanitary arrangements. It will be useless, urged the noble lord, to aim at the moral reformation of our operatives and artisans, unless we likewise aim at alleviating their physical necessities, and stimulating a love of cleanliness, of decency, and domestic comfort, which as yet too little prevails amongst them. Again, to effect this physical reformation in the condition of those who form the great mass of the community, we must further, observed Lord Shaftesbury, by some means bring within their reach those elements which kind nature meant, in their original purity and abundance, to be enjoyed alike by all—air—water—and we may add, some free space wherein to establish themselves, whether it be in town or country, on the surface of the globe.

Fresh air, wholesome water, and good drainage, may certainly be assured to those who dwell in our towns and cities, by proper local management, regulated in accordance with the various sanitary enactments now to be found in our statute-book. Building societies, freehold-land societies, emigration if judiciously promoted and well conducted, may together aid in effecting the other object to which we have alluded. Here, then, the lawyer is called upon to perform his part in the task of social improvement which has been suggested. It is his vocation to explain the law, he is called upon to interpret the acts of our legislature, and indicate the rights and liabilities which may, in executing them, be affected or incurred. This duty has been ably discharged by the writers named above. Mr. Bristowe has fully annotated the Local Government Act, 1858, (21 and 22 Vict. c. 98 ;) whilst in the larger of Mr. Glen's volumes, not only have the provisions

of the statute specified, but those also of the Public Health Act, 1848, been fully commented on and explained. This volume is divided into three parts, of which Part I. treats "of the formation of the districts of the local boards, the constitution of those boards, their election and general powers;" Part II. treats "of their powers as to sanitary matters and local self-government;" and Part III. treats "of their powers as to rating, raising money on mortgage of the rates, purchase of lands, audit of accounts, contracts, arbitration, legal proceedings, by-laws, and other miscellaneous subjects."

Mr. Glen's smaller volume is "designed for the use of local boards of health, and other local authorities, in the right execution of the powers conferred upon them by the statutes for the conservation of public health." In it will be found a full exposition of the law as it exists on this important subject, arranged in such a manner as will enable those who have occasion to consult the work, readily to understand the course of action which the law requires should be adopted to effect the removal of nuisances injurious to health.

We anticipate for the above-mentioned volumes a very considerable sale, because the information which they profess to give is needed in every town throughout the realm.

Events of the Quarter.

MISCELLANEOUS.

NEW LAW LIBRARY IN THE MIDDLE TEMPLE.

IN the afternoon of Monday, the 16th August, the ceremony of laying the foundation-stone of a new law library was performed in the grounds of the Middle Temple, by Sir Fortunatus Dwarris, F.R.S., who pronounced a suitable address; the *Builder* adds, a rare praise, "without tiring the mixed audience." The stone, inscribed, *Bibliothec. Med. Temp. Hujusce Ædificii, caput anguli, lapis Positus fuit, a. d. xvii. Kal. Sept. An. Dom. MDCCCLVIII. F. W. L. Dwarris, Equite, Thesaurario. H. R. Abraham Archi.* The building, from the design of Mr. Abraham, and to be erected by Mr. Myers, will consist of two lofty stories of chambers, separated by fire-proof arched ceilings, and above these a library, ninety-seven feet long by forty-two feet wide, and sixty feet high to the roof, which will be constructed with equilateral principals of rich open tracery. The building will be in the perpendicular Gothic style of the time of Henry VII., and its exterior dimensions will be 117 feet in length, fifty-three feet wide on the buttresses, and nearly 100 feet from the ground-line to the crest of the roof. There will be also a handsome oriel window projecting eleven feet five inches towards the river, and the whole of the fittings will be in harmony with the old hall as regards the rich open tracery. The library will be approached by a circular stone staircase in an octagonal tower at the north end of the building.

The following is the address of Sir F. W. L. Dwarris, the Treasurer:—
 "On this occasion of laying the first stone of a new law library for the Honourable Society of the Middle Temple, it is probable that ladies and gentlemen may be under alarm, lest they should be taken in, to find

‘Sermons in stones, and yarns in every thing.’

But it is not intended to inflict upon them a prolix oration; the little said, shall be suggestive, and not discursive. They all would be able to recall, without the repetition of commonplaces, the many excellent things they had heard, or read, upon the advancement of learning and the extension of science. And all would agree in hoping that such an occasion as the present might conduce to that end. But this present building was intended not only for a general, but also for a law library. Was there any thing peculiar and distinctive in that? He (the treasurer) thought there was—and would just allude to what it consisted in. A law library was not only like other collections of

books, an accumulation of the literary treasures of ages ; it was more. Nothing, in his opinion, traced the history of progress like a law library. It was the best *progressometer* in the world. Every thing there was preserved and recorded. First, it contained (or ought to contain) the laws of all ages and of all countries, and the laws which governed them—the *legum leges*. Next (the most important), it showed the application of those laws in the thousands and tens of thousands of adjudged cases, reported from all the courts, and accumulated and recorded in the law library. All good and evil,

‘*Quicquid agunt homines, spes, timor, ira, voluptas.*’

All men’s proceedings were preserved there, with all their actions, deeds, and wills. There you are all exhibited ! Society is reflected back with the truth of a photograph. How valuable must be such a record ! But the use and value did not stop there, with the reports. The Lincoln’s Inn inscription said,

‘*Aula vetus lites et legum ænigmata servat.*’

He agreed as to the value of the *lites* ; they showed the application of the law. But, as for treasuring the *legum ænigmata*, he thought the least said about them the better. Were we to be pleased with the puzzles, to be proud of the quibbles of the law ? He thought not ; but he would dwell upon what was of real value, the fact, that this depository of applied law, the picture of real life, was not only a record of legal movement, but of all intellectual, moral, and social progress. Instead of dissociating intellectual and moral progress, as was the result of the misleading cant and spurious philanthropy of the day, both were to be found contained there. We were always hearing now of mental improvement and of the ‘march of intellect ;’ but morality was treated as subordinate and dependent on the intellect ; such was not the case in the Law Library. He would give one instance and illustration of his meaning.

“Suppose an inquirer in the 16th and 17th centuries to search these records, he would be heard to say : ‘Unlike a former generation, I find here no mention of alchemy, or astrology, or casting nativities. They are all gone !’ So in the 18th century, a person who, for purposes of life assurance or from other motives, studied these volumes, would say : ‘It is wonderful how the shocking cases formerly so frequent, occurring from drunken bullies and duellists, have disappeared from the books. Not only do I find the errors of science exploded, but the solecisms of life and manners removed and removing.’ We thus see the intellectual and the moral (not separated but combined) ; exhibited together in the picture of social progress.

“He (the treasurer) had himself a sure faith in progress, but not in the unsound doctrines that continually exalt the intellectual at the expense of the moral sense. He would impress upon them, that it is in the union of sound science with pure morality, that we must find the highest improvements of which the institutions of law, and the law itself, are susceptible.”

APPOINTMENTS, &c.

The Right Hon. Thomas Pemberton Leigh, has been raised to the Peerage of the United Kingdom, by the name, style, and title of Baron Kingsdown, of Kingsdown, in the county of Kent.

The Right Hon. Dr. Lushington has been appointed Dean of the Arches, and Official Principal of the Arches Court.

J. B. Dasent, Esq., Barrister, of the Norfolk Circuit, has been appointed to the Judgeship of the Northumberland County Court, which recently became vacant by the death of Mr. Losh.

Robert Milnes Newton, Esq., Barrister, of the Norfolk Circuit, has been appointed to the Recordership of Cambridge, rendered vacant by the resignation of Mr. Serjeant Storka.

Francis Kyffin Lenthall, Esq., Barrister, of the Oxford Circuit, has been appointed to the Recordership of Woodstock, vacant by the death of F. P. Walesby, Esq.

H. Linwood Strong, Esq., Barrister-at-Law, has been appointed by the Judge of the Court of Probate to the office of Fourth Registrar of that Court, under the stat. 21 & 22 Vict., c. 95, s. 6.

COLONIAL APPOINTMENTS.—W. H. Doyle, Esq., Barrister-at-Law, has been appointed Assistant Justice of the General Court for the Bahama Islands; Matthew Baillie Begbie, Esq., Barrister-at-Law, has been appointed Judge in the Colony of British Columbia.

NECROLOGY.

July.

- 16th. EASTWOOD, Edwin, Esq., Solicitor, aged 33.
20th. VICARY, Benjamin, Esq., Solicitor, aged 92.
30th. LEWIS, Benjamin, Esq., Solicitor, aged 81.

August.

- 2nd. NORRIS, Robert, Esq., Solicitor, aged 63.
5th. WALKESBY, Francis Pearson, Esq., Barrister-at-Law, Recorder of Woodstock.
— TOLSON, Peter, Esq., Solicitor, aged 69.
6th. FAWCETT, Edward, Esq., of the Middle Temple, Special Pleader.

August.

- 11th. CHESTER, J. R., Esq., Solicitor, aged 36.
- SEARLE, Joseph, Esq., Solicitor, aged 85.
- 16th. CALLON, William, Esq., Solicitor, aged 75.
- 21st. SMITH, Joseph, Esq., Solicitor, aged 27.
- 27th. COLLIS, W. B., Esq., Solicitor, aged 49.
- CAPARN, Robert, Esq., Solicitor.

September.

- 1st. FIELD, Edward Ventris, Esq., Solicitor.
- 3rd. PICKUP, Mark, Esq., Solicitor, aged 43.
- 5th. RICHARDSON, Edward, Esq., Solicitor.
- 12th. CLAYTON, John, Esq., Solicitor, aged 57.
- 20th. ANDREW, John, Esq., Solicitor, aged 71.
- 26th. LAW, James, Esq., Solicitor, aged 59.
- 27th. DARLING, John, Esq., of the Inner-Temple, Barrister.

October.

- 1st. LOSH, James, Esq., Judge of the Northumberland County Court, aged 55.
- 2nd. CAMPBELL, John, Esq., Chief Registrar of the Court of Bankruptcy.
- SYKES, Edward, Esq., Solicitor, aged 69.
- 4th. CLARKE, Thomas, Esq., Solicitor, aged 68.
- 7th. RANKEN, Charles, Esq., Solicitor, aged 69.
- 11th. WEEKS, Henry, Esq., Solicitor.
- HORNER, Charles, Esq., Solicitor-at-Law, aged 46.
- 15th. BAYLY, Thomas H., Esq., Barrister-at-Law.
- 17th. GERY, Thomas O., Esq., Solicitor, aged 68.
- 19th. DAY, George Game, Esq., Solicitor, aged 62.

List of New Publications.

Archbold—An Abridgment of Cases upon the Poor-Law, from 1842 to 1858 ; being in continuation of Mr. Lumley's Poor-Law Cases. By J. F. Archbold, Esq., Barrister. Vol. 3, 8vo. 21s. cloth.

Bristowe—The Local Government Act, 1858, 21 and 22 Vic. c. 93 ; with Notes ; an Appendix of Cases decided upon the Public Health Act, 1848 ; and a copious Index. By S. B. Bristowe, Esq., of the Inner Temple, Barrister-at-Law. 12mo. 2s. 6d. cloth.

Dixon—A Treatise on the Law of the Farm ; including the Agricultural Customs of England and Wales. By H. H. Dixon, Esq., Barrister. Post 8vo. 14s. cloth.

Glen—The Law relating to the Removal of Nuisances injurious to Health, and to the Prevention of Epidemic and Contagious Diseases, with the Statutes, including the Public Health Act, 1858. By W. C. Glen, Esq., Barrister. 12mo. 5s. cloth.

Glen—The Law relating to the Public Health and Local Government, in relation to Sanitary and other Matters, together with the Public Health Act, 1848, and the Local Government Act, 1858. By W. C. Glen, Esq., Barrister. 12mo. 12s. cloth.

Leeming and Cross—The General and Quarter Sessions of the Peace, their Jurisdiction and Practice in other than Criminal Matters. By H. Leeming and R. A. Cross, Esqrs., Barristers. Post 8vo. 16s. cloth.

Lumley—The Law of Parochial Assessments explained in a Practical Commentary on the Statute 6 & 7 Vict. cap. 96. By W. G. Lumley, Esq., Barrister. 12mo. 6s. 6d. cloth.

Markham—The Divorce and Matrimonial Causes Acts, 1857 and 1858, with all the Decisions, New Rules, Orders, and Table of Fees, &c. By T. H. Markham, Esq., Barrister. 12mo. 2s. cloth.

Phillips—The Law of, concerning Idiots, Lunatics, and Persons of Unsound Mind. By C. P. Phillips, Esq., Barrister. Post 8vo. 18s. cloth.

Saunders—The Practice of the Magistrates' Courts. By T. W. Saunders, Esq., Barrister. Second Edition. 12mo.

Smith—A Handy Book on the Law of Bills, Cheques, and I. O. U.'s. By J. W. Smith, Esq., Barrister. 12mo. 1s. cloth.

Smith—The Local Government Act, 1858, 21 & 22 Vict. c. 98; with an Introduction, Notes, and Index. By J. T. Smith, Esq., Barrister. 12mo. 3s. cloth.

Snowden—The Magistrates' Assistant, and Police-Officer and Constable's Guide. By J. F. Archbold, Esq., Barrister. Fourth Edition. 12mo. 10s. cloth.

Taylor—The Local Government Act, 1858, and the Acts incorporated therewith, together with the Public Health Act, 1858. By T. Taylor, Esq., Barrister. 12mo. 9s. cloth.

Woolrych—The Game-Laws; including the Law as to Deer and other Wild Animals and Birds; with Notices of the Decisions on Appeals against the Assessed Taxes; and an Appendix, containing the Game Acts. By H. W. Woolrych, Serjeant-at-Law. 12mo. 7s. 6d.



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No. XII.

ART. I.—*Selections from the Charges, and other Detached Papers, of Baron Alderson; with an Introductory Notice of his Life.* By CHARLES ALDERSON, M.A., Fellow of All Souls, Oxford. T. W. Parker: 1858.

IN the beginning of the year 1857, Baron Alderson was removed by death from the prominent position he had long occupied in Westminster Hall, the active business of the world, and the society of no inconsiderable a group of warm friends and attached relatives. His natural endowments, and successful career in his profession, were such as to render it very fitting that the main facts of his life, and the peculiar features of his character, should be given to the world from the hands best able to record them. It is, therefore, with pleasure that we have seen published the small volume before us, which has, amongst other merits, that of being neither written with undue prolixity, nor filled with detail of no general interest—faults by far too common in biographies of the present day.

Edward Hall Alderson was born at Yarmouth, on September 11th, 1787. His father was Recorder of Norwich, Yarmouth, and Ipswich, and lived to enjoy the pleasure of seeing his son Judge of Assize on the Norfolk circuit. Although the family

seems to have had at this period close connection with the eastern counties, yet it sprang in earlier times from the north, on the borders of Yorkshire and Westmoreland—a circumstance of no small value in after years to the young barrister, when he joined the northern circuit.

The future judge seems from his early youth to have exhibited excellent talents, evinced first in his school career, and afterwards in his university triumphs. He was entered at the proper age at Charterhouse; but, as London air evidently injured his health, he was soon removed thence to the grammar school at Bury St. Edmunds, where he found several comrades, who were subsequently his companions or competitors in the race of life. Amongst the former was the late Bishop Blomfield, with whom he preserved a friendship till death parted them.

With a view of being prepared for Cambridge, young Alderson was next committed to the care of Mr. Maltby (afterwards Bishop of Durham), under whose able guidance he remained for the next fifteen months. That this was a happy selection of a tutor seems pretty clear from the fact, that, from within the circle of Mr. Maltby's pupils at one time, sprang a Senior and Second Wrangler, two Chancellor's Medalists, and two Smith's Prizemen—a rare exhibition of successful training by one master.

In 1805 the well-disciplined pupil was enrolled as a member of Caius College. "If any one," he afterwards was heard to declare, "had offered me, when going to college, the place of *Second Wrangler*, I would have at once refused"—so confident was he then (as, indeed, he seems to us to have been through life) of his own powers, and of his right to eminence. The result justified his own and his friends' expectations. In January, 1809, Alderson was declared Senior Wrangler, and afterwards first Smith's Prizeman. Ambitious for equal classical distinction, he entered forthwith upon the struggle for the first medal, and obtained it—thus, with a single exception from his own college, which occurred thirty-six years before, achieving university honours unknown to have been reaped by one man.*

* Lord Lyndhurst was Second Wrangler and Second Smith's Prizeman (1794); Pollock, C.B., First Wrangler and First Smith's Prizeman (1806); Lord Langdale the same (1808); Maule, J., the same (1810). In

In the course of the same year the triumphant University man arrived in the Temple to test his powers in a new sphere, where many a lofty college reputation has not been sustained. He there commenced reading in the chambers of Mr. Chitty. In 1811 he was called to the Bar, and joined the Northern circuit and Yorkshire sessions. The interest which one feels in reading the familiar names of those with whom Alderson now consorted, is not unmingled with a feeling of mournfulness at the havoc which time has caused among them. The northern circuit indeed, at the time he joined it, contained a brilliant group, whose fame will survive for many generations. Among the first which meets our eyes is that of "the famous Mr. Brougham," who it appears was one of the first to welcome the new junior. "I am," writes the young barrister from circuit, "going to spend a few days at Brougham Castle—the house of the great Mr. Brougham's father. This invitation was unexpected by me ; but, as you may suppose, I am not a little gratified that my acquaintance should be sought by so distinguished a man. . . . I like our sessions leader, John Williams, very much. What business he is in ! and certainly most deservedly. In a few years he must, I think, lead the circuit. Scarlett is the great man here—he has by far the most business, and when, as is expected, he gets a silk gown, he will annoy either Park or Topping a good deal. Allan Park has been very civil to me."

Again, in a letter to his sister, he says, "I have been staying, since I last wrote to you, with Mr. Brougham, at his seat in Westmoreland, where I spent a week in the pleasantest manner possible. The family is extremely amiable, seeming completely to love one another, and looking up to their eldest brother as to a superior man, as indeed he is. . . . I think you had the impertinence to ask how I came to be acquainted with Brougham.

later times, there was one whose career was prematurely closed by death, just when the profession discovered that there was a genius of high order among its members—we mean Mr. Goulburn—whose university honours were, perhaps, considering the higher demands made in later times upon students, really, though not nominally, equal to Alderson's. Mr. Goulburn was Second Wrangler and Second Smith's Prizeman, and he also took the first honour in classics, being first in the classical tripos, and senior medalist.

Answer it yourself, madam ; I cannot for modesty's sake. To be serious, however, he sought my acquaintance ; as, although I was from the first extremely desirous of knowing him, I scorn to court any man whom I consider my superior."

There was, in point of fact, no good cause for astonishment in Mr. Brougham taking occasion to make acquaintance with the young Senior Wrangler, who, besides having given palpable evidence of his high attainments in science and literature, was an agreeable and witty companion, and one fit to enjoy the society and friendship of the eminent inhabitant of Brougham Castle. Indeed, this place (to which future generations will make pilgrimages, as to a shrine hallowed by having been the abode of the great genius of the present time) has often received the fortunate possessor of great talents, which have been here recognized before the world has been able to descry or willing to acknowledge them. And here, too, many a leading as well as rising spirit of the day has enjoyed, and happily can still enjoy, the privilege of holding intercourse with a kindred genius, whilst receiving his generous and unaffected hospitality.

Fortunately for the young counsel he was not utterly without professional connection to begin with. He informs his sister in 1812, that in Michaelmas term he made two and a half guineas, in Hilary five, and in Easter six guineas. In Trinity he had nine motions, "owing to *two* new clients, for I have not had my average from my *one* old one." Neither was he destitute of support at sessions and on circuit, and he thus had the advantage of showing the world at once that he was there really for business, and could do it if it was offered him. He certainly improved these opportunities, and rose accordingly. Still he was not, however, quite satisfied with the rapidity of the progress.

In a humorous ode to "Adversity," written at the time, he affirms he could gladly dispense with all her "sweet uses," and exclaims,—

"But *stead* of Thee let bus'ness come,
 Attended by the ceaseless hum
 Of motions, briefs, appeals !
 How sweet her voice, how fair her mien !
 While in perspective dlm are seen
 King's counsel and the seals !"

During the next five years of his professional career, Alderson appears to have continued in the course of prosperity, though we have no particulars afforded us to judge by. In 1817 he undertook to report with Mr. Barnwell, and the five volumes of "Barnwell and Alderson" were the result, in which stand recorded many of the great judgments of Ellenborough, Bayley, Abbott, and Holroyd. After another space of five years, Mr. Alderson was a "successful lawyer," in large business both on circuit and at Westminster; and thereupon, in 1823, he married Miss Georgina Drewe. In 1825 we find also that his mathematical and scientific acquirements stood him in good stead, in introducing him as counsel to the opponents of the Manchester and Liverpool Railway on the parliamentary committee, when he had to examine George Stephenson. He contended before the committee on this occasion, and satisfied them, it will be remembered, that a train of forty tons weight could not travel on the rails at the rate of twelve miles an hour; and that in going round a curve, though the engine might possibly follow the turn, yet the trucks and carriages coming after it would, shooting straight on, infallibly pass off the road!

Although it would not have been unnatural for Alderson now to have turned his attention to politics and parliament, yet warned, perhaps, by the premature death of his connection, Lord Giffard, who had purchased high rank at the cost of a broken constitution, he judged, and probably wisely, that the chance of his health breaking down by excess of labour, and the lottery of gaining his object through party successes, were not to be preferred to a puisne judgeship, which he had certainly a right to expect he might ere long obtain.

During the next five years (from 1825 to 1830), Alderson's position in the circuit was simply that of waiting for the departure of the three or four great leaders, when he would have immediately assumed the lead. As he expressed it, he was "heir-apparent to the crown, upon the departure of the present holders." He generally appeared as second counsel in the most important causes; but he himself not unfrequently, at Lancaster and other places, though not having silk, led on one side or the other. Indeed he never arrived at the honour of King's Counsel; for

whilst on the eve of possessing this coveted honour he was raised to the bench.

In November 1830, he took his seat in the Court of Common Pleas—a young judge, being only forty-three years of age. At the time of this appointment he gave a pledge to Lord Lyndhurst that, if it should be found desirable to transfer him to the Exchequer, he would consent to the change. He sat on the equity side of the Court of Exchequer till 1841. The valuable reports of Young and Collier, embodying his excellent judgments during the time, are sufficient evidence both of his learning and success as a judge. We gather from the sketch of the life, given in the volume mentioned (p. 62) at the head of this article, that both he and his friends considered that for his eminent services, whilst performing the “double duties” of equity and common law judge, he ought to have received some substantial acknowledgment from the government. Unless, however, he had been made chief of his court when the opportunity arose, we do not well see how any appropriate reward could have been offered him. The promotion of a puisne judge to the chiefship was possible, and such a step might, we think, be often taken with advantage, although, doubtless, there are weighty reasons to be advanced to show the unadvisableness of such practice. We heartily agree that no judge was more zealous than was Baron Alderson, at all times, in performing his judicial duties, but special grounds and opportunities for granting him extraordinary rewards for his service are not so obvious to our minds.

Before we pursue the judicial history of this late excellent judge, we may pause one moment to look back on his career as an advocate. He lived with and was matched against legal giants. Brougham and Scarlett, Pollock and Wilde, Parke, Patteson, and Cresswell, were men who, in any day, would have been dangerous competitors. Besides these, there were others also who, though their names are not so well known or remembered by the present generation of lawyers, were nevertheless doughty antagonists. To have made for himself a footing and held his ground—to have gained and kept the field in the contests which belonged to such times and antagonists—argues remarkable legal powers in the leading junior of the northern circuit. His

best qualities in court, perhaps, were what we may term *adroitness* and extreme rapidity; the latter, indeed, sometimes as dangerous to himself as to his adversary. To the highest class of eloquence he had no claim; but to earnest, vigorous, and plausible management of his own case, as well as for watchful activity, unflinching courage, and ready wit in carrying on the war against his enemy, he had a deserved reputation.

His were the days, too, of nice distinction in pleading, of much technical science, and multifarious and artificial forms. Slight slips might be made, fatal to yourself or your adversary. To cover your own flaws and discover your enemy's, exhausted all the resources of legal subtlety. It is true this kind of practice produced the evil of engendering too much sharpness; but at the same time it caused the accomplished advocate to cultivate an acuteness, precision, accuracy, and minute erudition, which such a well-trained intellect as Alderson's possessed in an eminent degree.

For twenty years, then, during the interval of his university success till he reached the bench, did this able lawyer pursue the path which, after all, is the happiest part of a man's journey through life—that of conscious and continuous progress. By his talents and his labour he gained step after step. He could always look down with satisfaction on those he had surmounted, and upwards with confident hope to those he designed to reach. Believing that he ought to gain high rank in his profession, every year justified this belief and crowned his hopes. He did easily and rapidly that which many do slowly, with difficulty, amid various drawbacks, and after repeated disappointments; and if he sometimes may have thought, that had he been more ambitious, and stood out as a candidate for higher honours, his talents might have secured them too, he must also have had frequent cause for seeing the greater risk to his own comfort which he would have incurred, the greater chances of failure he would have met, and, after all, perhaps the doubtful enjoyment of such honours which he might have obtained. Looking, indeed, at his eminent competitors and successors, it seems to us at least obvious that his choice was right—and further, that the position he elected to occupy was that which he was best calculated to fill, both for his own advantage and the public welfare.

We do not mean to say that there is not a difference of opinion as to the judicial qualities of Baron Alderson. He was apt, it is said, to take capriciously a strong view of a case, and this at too early a stage of its history, and was not willing to alter his view at a riper period. His rapidity of rushing to conclusions, and the pleasure he had in arriving at them before any one else ; the confidence he retained in them when thus impatiently formed ; his tendency to make refined distinctions, and observe technical subtleties on some occasions ; on others, his disposition to view a case, independently of precedent, by the light of "common sense," and on its own apparently intrinsic merits—these we have often heard urged as reasons why Baron Alderson's judicial character could not be classed in the first rank.

To some extent we think these charges are true. But what a balance of qualities is required to make a "perfect judge!" Bacon, in his well-known essay "Of Judicature," amongst essential attributes which he enumerates, says—"Patience and gravity of hearing is an essential part of justice ; and an overspeaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the bar, or to shew quickness of conceit in cutting off evidence or counsel too short, or to prevent information by questions, though pertinent. The parts of a judge in hearing are four—to direct the evidence ; to moderate length, repetition, or impertinency of speech ; to recapitulate, select, and collate the material points of that which hath been said ; and to give the rule or sentence. Whatsoever is above these is too much, and proceedeth either of glory and willingness of speech, or of impatience to hear, or of shortness of memory, or of a want of a stayed and equal attention." A peculiar nervous organization in Baron Alderson, and perhaps the frequent occasions, from his boyhood upwards, when his quickness of wit and his mental superiority had been proved, induced at times an impatience and an appearance of self-sufficiency in his demeanour. It was chiefly if not entirely the former quality, we believe, which prevented his assuming his position as one of the most eminent of modern judges. But this defect we allude to is a grave one on the bench ; for we should remember that it is no adequate answer to the charge of impa-

tience in a judge to say, that in by far the greater number of cases he was intolerant of what was superfluous and impertinent only. If, in a small proportion of causes, injustice is done by reason of the truth having appeared *primâ facie* on one side, though it was actually on the other, a grievous wound is inflicted, and an impression raised injurious to the character of the judicature of the country.

Soon after his experience as a judge had begun, we find him writing (March 1833)—“I find I try causes very quickly, and yet I hope satisfactorily also; at least I am sure the juries think so: for with them I am a popular judge, as I always endeavour to bring the case to the real point, and always leave that point to them to determine, so that they trust me, as I don't at all infringe on their real privileges and rights. This is the secret of getting on fast; viz., discarding all the fudge and nonsense of the case, and coming to the real point.” And this is so beyond all doubt; the difficulty being, however, always to distinguish between them, and not to discard “real” points in the desire to eliminate “fudge and nonsense.” “Affected despatch,” it has been said by a high authority, “is one of the most dangerous things to business that can be;” whilst “true despatch is a rich thing; for time is the measure of business, as money is of wares, and business is bought at a dear hand when there is small despatch.”

We are not quite sure that Baron Alderson was so harmonious with juries as he seems to suppose in the above letter. Strange mutterings, we trow, were sometimes heard, more or less distinctly, emanating from the bench where the learned Baron presided, which were not altogether complimentary to the jury; and sometimes it went beyond muttering. Take for example the following scene, after a verdict returned in the criminal court which ran counter to the judge's opinion:—(*Judex loquitur*), “Good God, Mr. — (the officer at the assize), can't I have *another* jury, and let *these* twelve persons go into the other court, where they can't do so much mischief?” Then addressing the “twelve persons,” the judge continued—“Gentlemen, you will find in the other court, perhaps, in the course of the day, something you *can* try.” Next turning to the bar, but appearing to

soliloquize—"No doubt there are some men who never can comprehend what 'evidence' is; but that *twelve* such should come *together* to-day, and let that man off!" Aloud, to prisoner in the dock—"Prisoner, the jury have acquitted you! Heaven knows why! No one else in the whole court could have the slightest doubt of your guilt, which is of the grossest kind; but you are acquitted, and I can't help it." There was something in a scene like this rather comical, which was augmented by the eccentricity of manner which the learned judge sometimes exhibited in a very marked manner; but, at the same time, it evinced a righteous indignation at what the judge felt to be an iniquitous verdict.

It was not an uncommon opinion, we do not say it was a just one, that, during a part of the period whilst Baron Alderson sat in the Exchequer, the court "ran riot." Possibly the learned and, it may be, querulous counsel who, practising in that court, may have thus complained, meant that the course of arguments were so interrupted by objections and interjections, hypothetical cases, curious parallels, running comment, partial dicta and contradicts, keen thrusts in law, agile parries in equity, quick repartees in neither, pointed questions and promiscuous conversations, that some irritable advocates might perhaps conclude that every point of law connected with the case was fully—nay, wittily and brilliantly—dealt with, *except* that which was properly involved therein. Indeed, some have been heard to generalize too rapidly, and affirm that a very clever court is a hard one to get a hearing in. Whether this at any time, or to any extent, has been true of the respected court we are referring to, it is not our intention here to inquire. All acquainted with the course of modern law would, however, agree on two points: first, that during the last quarter of a century some of the most important and leading decisions have issued from the Court of Exchequer; and next, that Baron Alderson exerted no small influence over the court whilst a member of it.

If we were to express our own opinion of Baron Alderson's judicial powers, we should say he was an *unequal* judge. His wit, which was sometimes brilliant, at other times degenerated into very poor and rather old jokes—such alone as judges occasionally, with reference to the bar and other court company, or as rich

old relations in the presence of expectant heirs, can perpetrate with the chance of raising a smile.

He was, however, a man peculiar both in mental constitution and personal manner ; and, viewed only in his public life, his real character may have been, and we think often was, misjudged. Indeed, it is said, probably with great truth, that he was best known and appreciated in the relations of home ; and the writer of the biographical sketch before us refers (with some ambiguity of language) to the "hidden side" of his inner nature, "over which, moreover, its own complexity in certain particulars may have thrown a certain amount of disguise."

"The union," continues the passage, "in the same person, of conflicting tendencies—feelings which are more or less veiled from the recognition of the world—remain through life an enigma to many. It was impossible for those who knew him best, not to be conscious that much of his deeper nature, and many of his most endearing qualities, were thus liable to be hidden from superficial observers. There were certain points, in respect of which it might perhaps be justly said, that the character of which this narrative treats exhibited a succession of remarkable contrasts. There was a disinclination to change, and a clinging to the associations of the past, which might induce the notion that he was by inclination ultra-conservative, and ill-affected towards rational improvement at the price of change ; and yet instances might be cited on questions of social, political, and religious interest, in which the capacity of his mind to adapt itself to the requirements of the day was unmistakeably evinced. He could retain to the close of life the same engaging simplicity of nature, without impairing, on the other hand, his usefulness as a practical man of the world. Where he deemed it a duty, he could bring his mind to the posture of the most childlike faith, without ceasing to be, in other matter, an acute and close reasoner. It might appear surprising, too, that to a temper of mind essentially serious, he should have united the keen sense of the ludicrous, and uncontrollable love of fun, by which he will possibly be remembered when other and higher claims to recollection are forgotten ; or that, while apparently yielding somewhat to a con-

stitutional indolence of disposition, he should yet have cultivated the habit of incessant intellectual employment ; often most engaged in thought when, to all appearance, least occupied. But, apart from the points of antagonism, there were others also in which his character was liable to be misinterpreted. The warmth of heart and depth of feeling, which were veiled under a manner too inartificial to be always understood, were fully known to those only to whom circumstances were permitted, from time to time, to reveal them. Many with whom he mingled in society, and who have seen and judged of him from without, were backward to guess the strong sympathy which bound him to his fellow men ; and more than once has an erroneous impression been removed by the chance discovery of some act of kindness or timely countenance—some little evidence of feeling or word of encouragement, when encouragement was precious—something, in a word, which disclosed what lay beneath the surface, and opened to view a heart which emphatically could sympathize with the joys and sorrows of others. And if the kindliness of his feeling was liable to pass unrecognised, his expression of his views and opinions, from its very earnestness and freedom, was open to misconception of another kind. In talking on a matter which interested him, he was not careful so much to pick and choose his words, as to give free vent to the current of his thoughts, *liberare animam*. Even to a discussion of comparative indifference, his kindling manner and emphatic tones often imparted an appearance of warmth which the subject might hardly seem, to one who knew him less intimately, to warrant.

“ It will not be out of place to draw attention, before concluding, to a few of the most distinctive points in his purely mental powers. It was said by one of his earliest and most eminent companions, both on the Northern Circuit and the Bench, that he was an extraordinary instance of an acute and vigorous understanding, united to great powers of reasoning, and great wit. Perhaps the most marked feature, however, of his intellect was, not so much either its power to grapple with difficulties, or the logical ability which it possessed, and of which many of his legal judgments afford proof, as the singularly rapid and intuitive manner in which his powers of reasoning, and indeed of com-

prehension generally, were exercised. A hint or two, picked up here and there, often sufficed to enable him to spring upon the meaning of the whole; he had often, to a great extent, mastered the details of a subject, where ordinary minds would have probably only apprehended its outline. To this intuitive sagacity he owed not only in great part his professional success, but also the enviable ease with which he accomplished mental work of all kinds, however uninviting."

To that quality of his mind which enabled him to seize the facts and their meaning rapidly, we have already adverted; the other point just referred to, namely, the existence of strong *contrasts* in his nature, was undoubtedly one which was very remarkable. It gave rise to what we may perhaps call a grotesqueness in his character, which puzzled many observers. Thus he frequently, both on the bench and elsewhere, employed language and phrases of a description more often, and perhaps more appropriately, used in chapels or churches on solemn occasions, and we have seen him astonish the court by an address to a prisoner, which the chaplain of the jail might have borrowed with advantage for a sermon. On other occasions, and in other society, however, he would produce, from his stores of anecdote or laboratory of jests, specimens of facetiæ which would assuredly have confounded those who had known him in only his more serious moods.

Connected with this grotesqueness of nature, was the practice to which he sometimes gave way of seeing or "making" fun, when it would have been more decorous not to have been jocular. This generally resolved itself into verbal wit. The "laughter" which occasionally was thus raised in court, was felt by many to be unseemly, as indeed it always is when, the choice being between a decent dignity or funnyness, the latter is elected because of the temporary pleasure or popularity it confers. There have been and still are other instances, shewing that to keep up the reputation of a wit upon the bench is a dangerous attempt.

Baron Alderson, it will be remembered, was much interested in religious and theological questions. His letters to the bishops of Exeter and London, and one to a clerical friend who contemplated entering the Romish church, shew how strongly he felt on

these matters, and exhibits the line he took when the litigious religions of Mr. Gorham and the Bishop of Exeter were inducing them and their partisans to make holy and noisy wars against each other. The letters in question are very characteristic in style, and of more than usual excellence, and we are glad that they have been preserved among the other detached papers printed at the end of the volume before us.

His poetical powers were not so generally known as his theological predilections; nevertheless, several of the specimens of the translations and imitations evince real grace and most scholar-like feeling. To the last he maintained his love of the classics, and, during his vacations, seems to have fallen back upon his early pursuits with the freshness and avidity of his youth. The enjoyment, indeed, of these well-earned vacations, as narrated by his son, presents a most pleasing picture to the reader's mind. Happy in his family and with his intimate friends, rich in his own intellectual resources, and possessed of a genuine love of nature, he seems to have been equally delighted, whether in retirement at Lowestoft he stood watching from the garden the busy craft sailing by, or conned anew his favourite volumes, or boated in his chosen companionship along the Norfolk coast, or rushed forth on an unpremeditated and rapid excursion to the opposite shores, and explored a strip of the neighbouring continent. One may see with what buoyant joy he anticipated his annual holiday, in the following stanzas:—

My holidays, my holidays!

'Tis over, and now I am free
From the sharp attorney's tricky ways,
And the clerk's chicanery;
And the subtle draughtsman's tangled maze,
As he weaves the vacation plea.

My holidays, my holidays!

Now cometh the tranquil night,
And the twilight walk, and the upward gaze
At those distant orbs so bright;
While the swelling wave 'mid the pebbles plays,
And breaks with a gleam of light.

My holidays, my holidays !
O, will the time e'er come,
When, freed from this world and its weary ways,
And its trifles light as the foam,
'Midst welcomes of joy and songs of praise,
I may reach my real home ?

He reached his "real home" after a brief illness, from an affection of his ever-active, perhaps over-wrought, brain. He had, it is true, approached the verge of threescore years and ten ; but had remained apparently vigorous in body, and active in mind, within three weeks of his death.

He closed his useful, and we must believe happy, life, as a good man might well desire—in tranquillity and peace—surrounded by those most dear to him, and who loved him best because they knew him best.

ART. II.—*A Treatise on Private International Law, or the Conflict of Laws ; with principal reference to its Practice on the English and other Cognate Systems of Jurisprudence.* By JOHN WESTLAKE, Esq., of Lincoln's Inn, Barrister-at-Law, and Fellow of Trinity College, Cambridge. London : Maxwell, 1858.

THE subject of private international law has assumed, in our age, an importance which has belonged to it at no former period ; but the cultivation of this branch of juristic science has hardly kept pace (in England at least) with its growing importance. We are disposed, therefore, to welcome this book as a seasonable, as well as a valuable, addition to the works of former jurists on the same subject. A sketch of the literary history of this branch of jurisprudence, as distinguished from the particular doctrines which have been maintained in relation to it, will not be without interest in itself, and will, at the same time, lead to a more exact appreciation of the deficiencies which, we think, this book will supply in the library of the English lawyer.

From a variety of causes, and ultimately in consequence of that decree of Severus which extended the Roman citizenship to all the free subjects of the empire, long before the time of Justinian, there had ceased to be occasion to cite any laws but her own in the courts of the mistress of the world. In modern jurisprudence the conception of private international law assumes different systems of law, each operating within its own territorial limits over all the inhabitants of the territory in question. There was little scope for private international law, according to this idea, during the darker ages, when Roman and Lombard, Frank and Burgundian, might all be found in one city, *each living under his own personal law*, with habits of life and thought as divergent as those of the Englishman, Hindoo, and Moslem, who are now to be found aggregated together in modern India, each under the dominion of his own personal law.

Such circumstances might impede or prevent the growth of a system of private international law. It cannot otherwise be said that abstract legal ideas are uncongenial to the minds of semi-barbarous populations. Laws are among the earliest products of national thought, as they are among the earliest of social necessities. The history of our own common law, as well as of that of Rome, may teach us with what a pertinacious perversion of logic are legal theories in that stage pushed to their extreme, and all but intolerable consequences; while it was reserved to the era of larger and more manly views to introduce the tempering influence of equity.

It was in these later ages of Europe that, when the personal laws of parties came into collision, the principle was adopted of deciding by that of the defendant—a principle noticeable in this place not only as that which, in analogous circumstances, is now acted on in India, but as affording the earliest example of a rule of selection between conflicting laws.

It was only when a common Christianity, and advancing civilization, had effaced the distinctions of race, and impressed a uniform character upon the inhabitants of each separate territory, and when the study of the Roman law revived, that we find the modern conception of private international law (as a

body of rules of selection between different territorial laws) begins to appear in the commentaries on the *Corpus Juris Civilis*. It generally appears in the commentaries on the first law of the first title of the code *De Summa Trinitate*, where there is no inducement to its insertion beyond the word *volumus*, and the propriety of discussing the limits of laws in general in the commencement of a commentary on particular laws.

There cannot well be a stronger example of the strength and weakness of mediæval habits of thought, than is afforded by the commentaries on this law. The subtlety wasted in endless subdivisions, the earnestness worthy of a better cause, the weakness, and, in spite of the acuteness, the ultimate confusion, strongly exemplify the disadvantages of the commentatorial method as compared with that of original treatises. Take, for instance, the headings of the commentaries of Bartolus. First, *Relativum quis ponitur declarative, argumentative, augmentative, et restrictive*; next, a precept difficult to observe under the circumstances, *Lex non debet esse ludibrio*. In the tenth we reach *Argumentum de perjuro ad hereticum quando procedat*, and so on through fifty-one sections on a short law, including, *obiter*, a system of private international law on the word *volumus*! Indeed, the expansion by Lord Coke of one of Littleton's "&c.," is nothing to the feats in the same line of the commentators, and still more of the glossatores, on the civil law.

In these commentators two things may be noticed:—first, they conceive the question as that of determining the legitimate field of operation of each law, and not primarily as that of the conflict of laws having by possibility coincident fields. Secondly, as the differences of law in most continental states (that of Rome being the great foundation) had not yet become very wide, there is a dearth of illustration; indeed it sometimes looks as if important distinctions had been suggested by logic, without the aid of experience at all.

The period of these scholastic commentaries on the code *De Summa Trinitate* may be reckoned the first flourishing period of private international jurisprudence. Perhaps the subject was as well worked as it was then possible to work it. Among the last of these commentaries, and really intermediate in all but

form between them and the Netherlandish treatises of a later age, is that of the great Charles Dumoulin, which belongs to the middle of the sixteenth century. The topic most discussed by his predecessors had been the solemnities of acts, and the laws respecting the capacities of persons, and the destination of property; but Dumoulin dwells more on the merits of causes as depending on the will of the parties, and is consequently disposed, as in his theory of the implicit marriage contract, comprising even foreign immoveables, to extend the influence of that will, from whatever circumstances deduced, to cases which had been generally referred to the operation of law as excluding the interference of will. It must be regretted that such a jurist did not apply his fine and acute examination to a larger number of cases. But in fact the activity or caprice of modern legislators, or the real exigencies of different populations, had not at that time led to any considerable divergence on the wide field of mercantile law, and other ordinary contracts, in which Dumoulin was so peculiarly fitted to expatiate.

The commentatorial method was still followed by D'Argentre later in the same century, in his famous gloss on the 218th article of the custom of Brittany, but after that time regular treatises became abundant. The inducement to this lay not only in the increasing tendency to divergence of laws, but also in the displacement of some of the older reasonings through the more independent footing which modern nations had obtained with reference to each other. It was necessary to regard local statutes and customs no longer as merely permitted exceptions from the Roman law, the imperial will with regard to which it was necessary to ascertain, but as the enactments of autonomous legislators, the limitary extent of whose authority, as well as the expression of their will, had to be investigated.

The most important among the treatises of the seventeenth century are those of Rodenburg, *De jure quod oritur ex statutorum vel consuetudinum diversitate*; of Paul Voet, *De statutis eorumque concursu*; of Huber, *De conflictu legum*; and of Hertius, *De collisione legum*. In these works we do not find the important head of personal obligations much more thoroughly wrought up than before. For example, in Rodenburg's arrangement, con-

tracts only came in under the title, *De pactis quibus obviam itur juris diversitate*; and of forty-two rubrics under the title, nearly all relate to some question of family law, as of contracts made on marriages, or by the husband or wife with a third person after marriage, but considered as affecting the rights or liabilities of the other consort; while there is none which is not considered as contemplating or involved with either the operations of some personal statute, or of some statute, on the extensive solemnities of the acts.

On the other hand, those parts of the subject which relate to jurisdiction and remedies, received in this age an important development, as a natural result of the increasing intercourse between provinces forensically, if not politically, independent, wherein it was more common for the property of wards, deceased or insolvent persons, to be in several of such provinces. Another peculiarity of the time (as may be seen from the very titles of the treatises of Voet, Huber, and Hertius) is, that in the conception of the question, the idea of determining the proper field of each law was giving way to that of arbitrating on a conflict, which, from the nature of the conflict, presupposes some overlapping of fields. Huber indeed formalizes the assumptions, that, from the territorial character of sovereignty, the domestic law is always primarily applicable, subject only to retire in virtue of a comity by which it sometimes admits foreign laws within its own fields.

Passing from this, the second active period of its literature, we find that the eighteenth century did little for the subject. Its most formal work on it is that of Bullenoi, in two diffuse quartos, which contain much that is valuable, but are on the whole deficient in tangible and satisfactory results. It is of course not our intention to indicate in an article all the authorities of any age, or the passages to be met with in treatises not professedly on the subject; and we will therefore come next to the present century, in which private international jurisprudence has been cultivated with assiduity in France, Germany, and the United States, as well for the importance it derives from the frequent international intercourse of modern times, as in the two former countries from the necessity of reconsidering it with

reference to new codes and present juristic science, and in the last from the exigencies of a commonwealth of federal states, possessing separate legislatures, and consequently various laws. Hence (besides a multitude of other writings) have sprung those of Story, Fœlix, and Savigny. Story and Fœlix adopt fully Huber's doctrine of an arbitrary comity, and in spite of the wide actual discrepancies of opinion still cling to the idea, that rules of general reception exist by which the limits of that comity as a positive institution are ascertained. The natural result is, that the groundwork of their plan consists in the collection of authorities from all ages and nations, as witnesses to the concord which they seek to prove. They are further distinguished—Story, by availing himself of the forensic annals of two great mercantile countries, England and the United States, to develop the head of contract beyond any preceding writer; and Fœlix, by his details on the formalities of acts and of justice, and on the execution of foreign sentences. Savigny has taken up a wholly different line; seeking as a German to base the subject on principle, but as a German of the historical school, on principles not chosen from the metaphysics without reference to the facts of the matter. To his work (in every respect worthy of its author's reputation) we earnestly direct the attention of our readers. Forming the eighth volume of his "System of the Modern Roman Law," it does not indeed profess to meet the wants of those who live under other systems of jurisprudence; but as being a thorough and masterly discussion of international principles, from the point of view of one national law, it is of far more value to the students of the same principles, as carried out in the practice of other nations, than a book could have been of wider scope but less perfect execution.

If to these sources we add the late Mr. Burge's four volumes on foreign and colonial laws, in which not only is the selection between them and our domestic laws considered, but even their substance often stated with considerable detail; and though last, yet neither in importance nor in extent the least, the reports of decided English cases, it will be seen that the want which existed for English lawyers on this subject was by no means one of materials. But there was no book in which the materials were

prepared for their use in a satisfactory manner; since even that of Story, which has naturally been most in the hands of the English lawyer, is not only marked by a deficiency of arrangement, and a too general absence of decision by the learned author between the discrepant authorities whom he cites, but fails in some important respects to represent the actual state of the subject. In proof of this we need only mention, that no use whatever has been made of Savigny's work in either of the two posthumous editions of Story's commentaries which have been issued since its appearance.

The above sketch will be sufficient to show that there was not only room to write, but an urgent need in the library of an English lawyer for a new book on private international law. Indeed, it would hardly have been possible to write a book on this subject which would not have been some gain. But we congratulate the profession that the task has fallen into the hands of one so competent as Mr. Westlake, who has produced a work of great ability, and (as we expect) of great usefulness, to the practising lawyer. We need not apprise such lawyers that a book may prove the high ability of its author, but somehow fail, except rarely, to show that the particular subject on which it is consulted has presented itself as a question to the mind of the author. It is curious to observe how some works, while proposing to embrace a whole subject in a small compass, contrive, in the still smaller space allotted to each branch, to give more practical information on details than larger works devoted exclusively to that one branch. The late Mr. Burton's compendium of the law of real property is a striking example of this excellence. Mr. Chance's book on powers (a work in many respects remarkable) possesses the peculiarity, to an extent of which we know no example, of showing that hardly any case connected with the subject of the book occurs in practice which has not presented itself to the author's mind, and been the subject of his meditations. If Mr. Chance had gone one step further, and given more frequently and more forcibly the conclusions of his own remarkable intellect on the points which he thus shows did not escape him, he would have added enormously to the popularity, as well as to the value, of his book. Mitford on pleading, from its bulk promises only

a compendious statement of general principles ; but these principles are so thoroughly comprehended by the author, and the details from which they are extracted so fully present to his mind, that the principles, as stated, are found to apply to the particular cases with an exactness and completeness altogether admirable.

This is a species of excellence which cannot with confidence be pronounced to belong to any book which has not been found to possess it by experience, that is, by repeated reference to the book for practical purposes ; but we are strongly inclined to expect that it will be found to appertain to Mr. Westlake's book. It is clear that the author has made himself master of all the learning on the subject; that is, has not only read, but has digested and exercised a critical and independent judgment of all the works and discussions on the subject, and on their plan, purpose, and merits; and has assigned to each its proper place, as a part of the learning on the subject. In writing a book on private international law, he has evidently qualified himself to write a history of that portion of jurisprudence ; and, what for the practical utility of the book is more important, he has apparently exhausted the cases in the modern English reports.

While we are sensible of the many excellences of Mr. Westlake's book, we must not omit to notice that it has a fault, in a certain elaboration and academic stiffness of style, which is by no means necessary for exactness and precision in the expression of the author's meaning ; and which makes the task of getting at that meaning more difficult to the reader. This is the more to be regretted, as, from the scholarly and disciplined mind of the author, he can find no difficulty in writing simply as well as eruditely.

It is not possible that any work on such a subject as private international law, should meet with universal acquiescence in all the views therein expressed ; but we think that Mr. Westlake's views and conclusions will be very generally acquiesced in by English jurists. We are satisfied that no English lawyer who is called on to advise on the subjects of domicile, marriage, the international obligation of laws, including the transfer of obligations, the succession of moveables, and kindred subjects, will omit to consult Mr. Westlake's book.

ART. III.—CURIOSITIES OF LAW.

1. CONVEYANCING AMONG THE COPTS OF THE EIGHTH CENTURY.

THE learned West, in the introduction to his work called "Symbolæographia, which may be termed, The Art, Description, or Image of Instruments, Covenants, Contracts, &c., or, The Notarie or Scrivener," after indulging in some very long-winded dissertations upon matters remotely bearing upon his immediate subject, feels it necessary to devote a whole section to defend and excuse himself.

In the course of it he says, "For as no common-wealth dooth consist onlie of naturall and homeborne subjects, but hath in it oftentimes many strangers, and yet is not thereby either weakened or disturbed, but rather strengthened and adorned; if they be neither exceeding many in number, nor by nature factious and overbusie with matters of estate; so in arts, besides the essentiall precepts thereof, may sometimes be tollerated forreine doctrine requisite for the easier understanding thereof, being used with moderation. For although arts in nature be distinctlie separated, yet in use they must needes be linked and conioyned, wherefore we have presumed heere thus lightlie to touche these bie matters."

We would shelter ourselves under the example of this respectable old conveyancer, in introducing to our readers of the same profession, a few curiosities of Symbolæography which have recently come under our notice, and which, though bearing only remotely (if at all) upon any practical points, may serve to lighten a half-hour snatched from severer labour.

A few years ago, somebody discovered an old wooden chest in the ruins of an ancient monastery near Thebes in Egypt. The chest contained a number of papyrus rolls, and a few skins of leather inscribed with mysterious characters. These documents were brought by the finders down to the Nile, the High Street or Cheapside of Egypt, where they quickly found purchasers among the swarms of English who now frequent that thoroughfare, and thus a number of them made their way to England, and the

larger part ultimately received lodgment in the British Museum, a few in private collections. Having been submitted to competent decipherers, they proved to contain, not as the reader perhaps is inclined to anticipate, Confessions of a Convent, Memoirs of a Monk, or any such romantic matters, but a number of deeds of gift, wills, and contracts, dating apparently from the eighth or ninth centuries of our era, one only of them being written in Greek, and the rest in Coptic. As legal documents of such an age, and derived from such a quarter, are rarities in their way, we propose to give some account of them.

It is to be observed that we are indebted to the church and monastic institutions for almost all the examples of ancient conveyancing that have come down to us. From ecclesiastical repositories in Italy were obtained the numerous specimens of wills and grants published in the collections of Maffei and Marini. The chartularies of the abbeys and monasteries suppressed by Henry VIII., have supplied all the means of knowledge which we possess of the *Res diplomatica* of the Anglo-Saxons. No doubt, in the dark ages, merchants and other lay folk had their deeds, contracts, and conveyances; but these have nearly all perished, and those documents only which concerned the property of the church or the monks have been preserved.

This may be one reason of the religious colouring which marks most of these documents. The old Roman precedents of legal instruments, upon which those used in the middle or dark ages are modelled, had a far more secular tone. The specimens recently obtained from Egypt, of which we are about to give an account, are, like their European congeners, grounded upon the Roman type, but modified with a strong infusion of religion, though whether they were drawn up by monks or by lay notaries is not quite certain.

History has preserved no account whatsoever of the monastery in the ruins of which these archives were found; but it appears from the documents themselves that it was dedicated to a certain saint and martyr named Phœbamon, that it stood on a hill named Djemè in the nome of Hermonthis, in the neighbourhood of the castrum or town called Memnonium. We have before us copies of some twenty of these documents, comprising three wills

grants of land, of sheep and cattle, of palm-trees, and of serfs, to the monastery, besides a contract or two between private individuals.

Few of these deeds are quite perfect; but from those which are so the following general account of their structure may be given. It will be seen that they have a close resemblance in form to the Anglo-Saxon charter, as described by Kemble in the introduction to the "*Codex Diplomaticus Anglo-Saxonicus*," vol. i.

1. The Invocation. This is the ejaculation which is found at the head of nearly all early charters of whatever kind. "In the name of the Father, the Son, and the Holy Ghost," or "In the name of the holy, consubstantial Trinity," &c. The Anglo-Saxon charters afford many varieties.

2. The Date. In these Egyptian charters the position of the date is different from that in the European ones. In the latter it is generally placed at the end, immediately before the teste. Here it is woven up with the invocation. The day of the month is given, and the year of the indiction; a most useless method of dating. In one single case only is a date given by reference to an era, that of the Saracens, and this enables us to assign the date of A.D. 780 or 781 to the manuscript which contains it. As these papyri do not appear to differ widely one from the other in language and writing, it is inferred that they all belong to nearly the same period, namely the close of the eighth and beginning of the ninth century.

3. The Parties. The next member of the Egyptian charter is one which does not occur in European examples. It is the naming of the parties, with their descriptions, which is done in a regular and formal manner.

4. The Recitals. This is followed by what Mr. Kemble calls the proem, or, as it is sometimes called, the movent clause. In the charters we are examining it mostly consists of two parts—a general reflection justifying the grant about to be made, and a special recital of the circumstances which have led to it. In the former part it is usual to observe that earthly things are transitory; that it behoves a man to bestow his possessions in doing good; that the law permits and encourages a man to do what he will with his own, especially if it be a work of piety. It is thus that a

number of grants, made by parents of their own children, as perpetual serfs to the monastery, are precluded. The special recital in such cases usually states that the child had been attacked by a dangerous illness, was expected to die, and that the parents had vowed it to the monastery in case it should recover. Frequently it is said that when, through the intercession of the saint, recovery had been obtained, the parents had endeavoured to elude the fulfilment of the vow, but, having been brought to see the error of their ways, are now desirous to make the grant.

5. The Grant. Next follows the actual grant, generally accompanied with great protestation of being made without compulsion or fraud of any kind, and with a most perfect understanding of the nature of the transaction. The grant is made to the principal of the monastery and his successors. Sometimes a wife joins with her husband in the grant of a child. In one case a whole community or village joins in a grant of land.

6. The Sanction. An important part of the mediæval charter was the sanction, or what we perhaps should call warranty. It threatened the most fearful punishments in another world to any one who should infringe or impugn the grant, and named in some cases a penalty in money to be paid. The fate of Judas, Ananias, and Sapphira, was invoked upon the offender, and the vengeance of the saint of the monastery was threatened. All courts and officers were conjured to assist in imposing the fine, and enforcing obedience to the charter. This claim was directed chiefly against the heir and representatives of the grantor. The money penalty was in use in Roman charters of the time of Augustus (Kemble, *Cod. Dipl. Anglo-Sax. Introd.*, p. lxiii.); the spiritual terrors were introduced by the ecclesiastical conveyancers as soon as property began to be bestowed on the church.

7. The Signature. The document wound up with the signature of the grantor, whose ignorance of writing often made it necessary for a scribe to sign for him, a fact which is always noticed. No seal was used.

8. The Teste. After the signature of the grantor follow those of the witnesses, who are sometimes numerous. Each name is usually preceded by the mark of the cross. Those witnesses who could write signed their own names, but many found it necessary to have this done for them.

9. The Notarial Signature. Last of all, at the foot of the sheet, the notary who drew up the deed, or before whom it was executed, wrote his name, not as a witness, but as a memorandum of the regular execution.

The following deed, the gift of a child, will exemplify the above analysis in most of its particulars, (Brit. Mus. Pap. LXXIX.): —“In the name of the Father, Son, and Holy Ghost. Written the — day of —, Indiction 9th—I, Staurou, the daughter of Peshate deceased, belonging to Pepekei-em-matoi, in the province of Toi, who am residing in the monastery of Father Sergius, in the Castrum of Apè—having sought for a notary to write for me, and trustworthy and respectable witnesses to attest this inviolable, unexceptionable, indissoluble deed of gift, according to the established laws—make this writing to the holy place of the crowned martyr, holy Father Phœbamon, which is situate in the mount of the Castrum of Djemè, to the hand of thee, the most reverend deacon Father Sourous, and of each one of thy successors for ever, greeting. Forasmuch as the law of God commands and exhorts every one, that each one should do what is good and beneficial for the health of his soul; and next, that no temporal authority shall hinder any man from doing what he will with that which is his own; and whereas the good God ordained that I should bear a male child, whose name I called Andrew, by God’s ordination there came a sickness upon him, according as my sins deserved. I brought him to the holy place of Father Phœbamon, the honoured martyr, which is situate in the mount of Djemè. I placed him before the altar. I besought him (the saint) with prayers and supplication, saying—‘If thou wilt intercede for him before the Lord, that his mercy may restore him, and that he have mercy on him, I will give him for a servant of thy holy place, that he may serve the holy monastery, both with the service of his body, and also that he may give his wages to the *lamp* of the holy place, to the hand of thee Sourous, the deacon and principal of the holy place there—so that no man shall have dominion over my beloved son Andrew but the holy place only—so that he shall do service to the place all the days of his life, in like manner as all the servitors of the monastery—so that he shall pay in his wages to the holy monastery year by year’ Considering that I am a sinner, I have appointed and

granted my beloved son Andrew to the holy monastery for the health of my soul, and I have entered into this deed of gift for ever. I, Staurou, the daughter of Peshate deceased, whose name is first above written, being willing and persuaded, without any deception, or fear, or violence, or craft, or circumvention, without any necessity lying upon me, I will that the holy monastery should have dominion over my beloved son, and over the labour of his hands, and the service of his body; and it shall not be lawful for me, nor for any man of mine, whether great or little, whether one who rules or one who is ruled, to contest with the holy monastery for the child, accordingly—nor to make any claim upon him before any power or authority, either little or great. And whosoever shall dare to do this, in the first place let him have no benefit in any thing; but God shall set him before his holy oratory, that he may give account at the bar of God for those things which he has done, to the prejudice of our vow and our offering, which we have vowed to God. And let him fall under the curses which are written in the Deuteronomy of Moses, yea, that he may see the kingdom of God opened, and he himself forbidden to enter into it. Surely I have confirmed this free deed of gift, that it may be sure, firm, and strong in every place, before every authority, exalted and honourable—that it may be known that I have acknowledged it. It having been read to me, I have heard it, I approve it, and have confirmed it with trustworthy witnesses, and have published it in conformity with the laws.

× “Staurou, the daughter of Peshate deceased, belonging to Pipek Matoi, in the province of Tioi, who is dwelling in the monastery of the Holy Sergius, in the Castrum of Apè, signs this charter of gift, in manner as it has been written by me, Theophorus, the least of priests, the son of Basilus deceased, a deacon, belonging to the city of Tbo, who, having been requested so to do, have written this for her, she being ignorant of writing, and I bear witness to this charter of gift, in order to its validity.

× “We, Philotheus (son of) David, and John the son of Pilom, and George the son of Pesunthius, dwelling with the holy father Paphnutius, of the mountain of Apè, bear witness to this charter, in order to its validity. I, Theodorus, having been requested by them, have written for them, they not knowing how to write.

× “I Kalapese, the son of Andrew, deceased, bear witness.”

The following is a rather shorter specimen. It is written upon a skin of leather.—(B. M. Pap. XCV.) It is remarkable from containing a date according to the Mohammedan era :—

“In the name of the Father, and the Son, and the Holy Ghost. Written in the month Pharmuthi, in the 5th Indiction, the year of the Saracens 164.

“This grant, inviolable and unshaken until eternity,—We Petnoute, the son of Panias, and Tasia his wife, the daughter of Theutate, of the Castrum of Djemè, in the Nome of the city of Hermonthis, have established it. Whereas, in this time in which we now live, there was born to us a child, and we called his name Panias. Afterwards God sent a great sickness upon him, and he went near to die. Then we bethought us in our hearts that God has said, ‘I have not placed man upon the earth for ever,’ let us dedicate our child Panias to the monastery of the holy father Phœbamon, of the mountain of Djemè, in the land of our own Castrum. When, therefore, we had vowed him with all our hearts, we took him to the monastery, we cast ablutions of the water of the holy place upon his body, and God and the prayers of the martyr there granted him recovery, and he advanced forward little by little. We besought the steward who presided over the place, that he should receive our offering from us into the holy monastery. Then we placed him in the holy place for a few days, the steward taking care of him, together with me, Petnoute his father, until the cure was finished within the holy place, and he advanced forward little by little. When God, to whom righteous judgment belongs, had visited the child and had granted him recovery, we took him to our house—we spent many days in tending him, until his body became strong. Then we came before the steward, which is Father Sourous, the president of the holy place, saying, since the God of the place has granted recovery to the child, wilt thou that he enter the holy place, and serve therein? God is with thee, and commands it. Wilt thou that he labour within the holy place, or that he do in like manner what thou imposest upon all the children in the holy place? God is with thee, commanding it. We conjure, therefore, every power and authority by Almighty God, before whom

this grant shall come, to watch over it, that it be not violated for ever, seeing that we have granted our child with all our heart to the holy place. I, Petnoute, and Tasia his wife, we have signed it. Whosoever shall violate this charter, let him be estranged from the Father, and the Son, and the Holy Ghost, and all the fellowship of Christians, seeing that we have dedicated him to the holy place.

× "I, Theodorus, son of Victor of Sinai, bear witness."

× "I, Pachomius, the son of John of Pakei, bear witness."

× "I, Leo, the son of John of the monastery of ———, bear witness."

Both the preceding chapters are written in Coptic. We will now give a specimen of a will, a much more lengthy document. The original (B. M. Pap. LXXVII.) is in Greek, although the testator, who is the bishop or abbot of the monastery, was ignorant of that language, as will appear. The beginning is unfortunately lost. We may suppose that it commenced with an invocation and date, and the name and titles of the testator. We first pick it up in the midst of the poem or recitals:—

* * * The end of life being (unknown) to all men * * * My body being worn with toil, I shall quit this life suddenly and unexpectedly, the future being obscure; wherefore I have determined upon this writing, not to be repented of, a last will, having firmness according to the authority of the laws, wheresoever produced and made public, in which I covenant willingly and with full persuasion, without any deceit, or fear, or force, or craft, or any necessity, or any lawful exception or circumvention, or any device whatsoever, without any kind of double meaning or ill meaning, but of my own proper purpose and design, spontaneous and voluntary, of my own will, being of right understanding in all things, with the fullest control and independent power. I deal with thee in full persuasion and choice, alive, perceiving, thinking, having a sound understanding, and possessing my reason in perfect clearness, and walking on the earth and giving orders. This, which we call the last will, I have caused to be written in the Egyptian tongue, and also in Greek words, according to the ordinance of the well and piously established laws, plainly declared now whilst I am alive and well, and in the enjoyment of all my moderate means. But in case, which Heaven avert, I should suffer the lot of man, and must leave this life, I will and command after my decease, that thou, the before-mentioned Victor, the most reverend priest and my disciple, enter upon and inherit from me that moderate substance of all kinds which I shall leave behind me, both that which moves and that which is immoveable, and

that which moves of itself, of every species and kind, and quality and quantity, both of gold and silver, and woven-stuffs and brass-work, and clothes and writings and furniture, and waste places and houses, and all things whatsoever, from the valuable kind down to the least value, even a plethrum (10 sq. feet) of land, and a penny-piece and a farthing, and the commonest earthen or wooden or stone vessel—(thou shalt enter) upon this same moderate property of all sorts that shall be left behind by me, of those things which belong to me by law of inheritance, and those which were obtained by my own sweat, and by purchase and gift, and any other device whatsoever in writing, or (without) writing. Moreover, also, the holy place of the holy-crowned martyr father Phœbamon, who lies in the before-named divine mountain of Memnonium, as well as the uninterrupted dominion thereof, I devise it to thee with the consecrated stuff thereto belonging, from the cheap sort to the valuable, even a cinder, to the end that thou, the before-mentioned Victor, the most pious priest and monk, my disciple, after my decease mayest straightway and immediately enter upon the moderate property that shall be left behind by me, to possess and hold, and govern all things which shall be left behind by me, of all sorts of things, from the small sort even to the least, even a plethrum of land, and a penny-piece and a farthing, and the commonest earthen or wooden or stone vessel, yea even also the fragile glass, together also with the consecrated stuff thereof, from the cheap sort to the precious, and that which I have before clearly expressed in words * * * to dispose, arrange, enjoy, inhabit, build up, distribute, let out to hire, release, exchange, give, grant, partition, and to govern all things in regard to them independently and without hindrance, and out of them to expend upon the administration of the said [place] upon those of the place, and of the region, and the poor who pass by, because I have so decreed and arranged, and have entered joyfully into this full testament and assurance. Let therefore none of my near kindred, nor any other of my race, neither on my father's nor mother's side, neither brothers, nor nephews, nor relations, nor cousins, nor any other human person whatsoever, be allowed ever on any occasion or time to invade thee, or thy heirs, or successors, or assigns, or any one else in whom thou hast an interest; neither to implead in a court of justice or out of one, whether home courts or those beyond the frontiers, whether a little or a great one, nor to impugn before friendly arbitrators, nor to bring suit against thee or thy successors before any ruler or judge whatsoever, neither by seizure in the Most Holy Church, or in the Prætorium, nor to use any device, nor to use any legal claim or formula against this testament, or any part at all thereof, nor yet * * * according to the whole. Wherefore, besides all this, it has been approved, and is conformable to my good intention, that (thou) shouldst receive and pay on my account; if I should be found having either creditors or debtors, that thou shouldst make all receipts and payments on my account. And if any person at any time should endeavour to oppose this unexceptionable

testament, [I devote] him who shall do any such thing even at any time; first, that he be liable to this sacred and awful oath, and the penalty of perjury; and next, that he be subject to indictment and the fine appointed against those who dare to violate divine and royal oaths, and that he pay, by way of damages and on account of his trespasses, six ounces of fine gold, to be exacted verily and forcibly from that which grows upon the land, and from his substance * * * and thereupon that he be compelled to abide by all that is written in this invulnerable testament. I will and command, after my departure from life, that the burial of my body, and my holy offerings, and * * * and the days noted with my death, be performed under thy direction, according to the custom of the country, and according to my figure and quality. And I also covenant, that if any other before-made or after-made charter should be produced, in opposition to this testament, which has the sanction of the laws for the establishment and security of all the things covenanted by me, I swear by the holy and consubstantial Trinity, and by the habit (garment) with which I am clothed, in nothing to transgress, nor to shake all the things before written, but that they shall be unshaken and irrefragable perpetually, through this present testament, from which let guile and wicked envy depart and be absent, which I have made unto thee for security, being valid, and * * * wherever produced and read, before every lawful ruler, and authority, and power, according to the sure copy of the scribe who writes for me, and the trustworthy witnesses below-named, attesting at my request and persuasion; and I have been questioned as to the whole, which has been interpreted to me in the Egyptian tongue by the below named notary, and has satisfied me, even as I dictated with my mouth; I have covenanted that these things are right, and that I will give, do, keep, comply with, and remain in them, and I have delivered this.—*Nota bene*. Forasmuch as I have declared that I abjure gold and silver, according to the oath, and, according to the faith of the Christian, gold and silver have I none, nor yet have I from the soil (?) of the earth * * * neither within nor without, except one trimesium (three months' allowance), and this I have not allowed to be owned to at the time of my death, and from that time I have given the same to the account of the poor (except as has been said). Gold and silver have I not, and I have to give account to the Lord God concerning this.

× I, the before-written Abraam, by the mercy of God, bishop and anchorite of the holy mountain, Memmonium, son of Sabinus of blessed memory, Rebecca being my mother, have made this testament * * * (and have confirmed) all the heads and covenants which it contains with a sacred oath, and the before-mentioned penalty, and I sign all the things within-written, as is before mentioned, and have delivered this.

× I, Joseph, son of John, the least of priests of the Holy Church of Hermonthis, having been requested, have written this for him, he not knowing how to write.

× I, Dioscorus, son of Jacob, chief (priest) of the Holy Church of Hermonthis, bear witness to this present testament, having heard it from the most holy father Abraam, bishop of Hermonthis, who made this testament.

× I, Phl. Pantonymus, son of Apadius, bear witness to this present testament, (being requested) by the maker of it.

× I, Phl. Abraam, son of Theodosius, a citizen of Hermonthis, witness this sale (mistake for testament), having been requested by the maker of it.

× I, Paulus, son of Abraam, the least of deacons, bear witness to this present will, having heard it from the maker of it.

× I, Phl. Theophilus, by the will of God, advocate of Hermonthis, bear witness to this testament, having been requested by the maker of it.

× By me, Peter, this was written.

We shall conclude with an extract from a charter in which the whole community of a village joins in a grant of land. The introduction is lost, and the abutments are mutilated; the end, too, of the charter is wanting. The extract will, however, be sufficient to illustrate the form in which a corporate grant was made.—(B. M. Pap. XC.)

These therefore are the abutments of this field, according to ancient boundaries. We, the whole community, inhabitants of the Castrum of Djemè, both those who shall subscribe and they for whom subscription is made at the foot of this grant, covenant not to transgress any thing of all which is here written, neither we nor our children, nor they who shall come after us. And whosoever shall transgress any of all the things written in this grant, in the generations which shall come after us, he shall pay twelve holcotini, and afterwards that man shall go before the tribunal, that we may litigate with him for what he has done, and that the holy father Phæbamon may litigate with him, and every soul that eateth of the ministration of the holy father Phæbamon shall litigate with him. And we conjure every power and authority into whose hands this charter shall come, whether Lashan, or diocesan, or any power into whose hands this grant shall come, not to transgress any of the things which are written therein, whether small or great.

Although it is, in the first instance, strange to see, in the forms of legal language employed by them of the olden times, the close resemblance to those in use among ourselves; yet on reflection we perceive, that as the idea of *property* belongs to all times, and the facts of possession, transfer, and security of title, are almost necessarily a part of this idea of property, it is therefore not unnatural that the technical phraseology of former ages should have flowed in channels analogous to those of our own or any other day. The introduction of the religious element into testamentary

instruments, especially when the beneficiaries were religious institutions, is likewise what might be expected. In the latter respect, however, the tone of the ancient testator's language (or his draftsman's) varies considerably from that which our conveyancers of modern times—the Duvals, Brodies, or Christies—employ; nor would Mr. Davidson's "Concise Precedents" be improved by the introduction of the imprecations, and other characteristic expressions which his mediæval predecessors thought it useful or ornamental to introduce into their forms.

Notwithstanding, however, that our learned chamber counsel of Lincoln's Inn may not derive much practical advantage from the study of the precedents which have been reproduced in our pages, still we hope, and are inclined to believe, that these curiosities will be perused not without interest.

ART. IV.—RESULTS OF THE COMMON LAW PROCEDURE ACTS, 1852 AND 1854.

AFTER more than six years' experience of the first of these acts, and more than four years' trial of the second, we may fairly propose to ourselves the question—how have they worked? A not inconvenient mode of finding an answer to these queries will be to refer, as briefly as possible, to such of the recommendations of the Common Law Commissioners as have been professedly carried out in the acts, and then consider how far the acts have, in fact, carried them out. In so doing, we shall avoid unnecessary minuteness in discussing smaller changes, dwelling only on those alterations which are the most prominent and important.

And first, as regards pleading. After shewing, in the most conclusive manner, how conducive the science of pleading must be to the eliciting of the matter to be tried, and also to economy as regards the expense of witnesses (a fact well known to those accustomed to advise on evidence, or at least to those who advise with some knowledge of pleading, and without a knowledge of pleading no man is fit to advise on evidence at all), and after

shewing that, in a highly civilized state, where commercial transactions are numerous and complicated, the fact of persons coming into court without any previous authentic information as to the complaint or answer—in other words, without pleadings—would lead to intolerable fraud, oppression, uncertainty, and expense; and, expressing their belief that such a state of things never existed in the code of any civilized nation, the commissioners proceeded to consider what had made special pleading so unpopular—what in fact it was, that, not with those merely who did not or would not comprehend the science, but with those who did, had created a conviction that (to say the least) it was too costly for its results; and they sum up the objections under five heads:—

1st. "The vagueness and uncertainty allowed in some cases."

2nd. "The fiction permitted in others."

3rd. "Undue prolixity."

4th. "Unnecessary precision and over-technical rules."

5th. "The power reserved to the opposite party of passing over a defect in a pleading in which the first fault occurs, and taking advantage of it afterwards, when all the expense of the suit has been incurred, and the defect cannot be remedied," alluding, of course, to motions for arrest of judgment, and for judgment *non obstante veredicto*, and to error in law.

So that the unhappy science was at one and the same time accused of vagueness and uncertainty, and of unnecessary precision.

The most prominent instance of vagueness and uncertainty was that afforded by the common *indebitatus* counts, which are so flagrant a violation of the theory, that the pleadings in a cause should be so framed as to give to the opponent particular information, that they must have been condemned, had it not been that their generality was corrected by particulars of demand; and therefore the commissioners leave untouched these counts, in deference to a strong opinion expressed by distinguished members of the profession in their favour, and the act retains them, abolishing only the perfectly unnecessary fiction of *indebitatus assumpsit*, and we think they were retained with good reason; for if, in every case now met by the count for money received (the

most general and vague of common counts), it had been enacted that the facts rendering the money received to the plaintiff's use should be set out on record, we should have aggravated the evils of prolixity and unnecessary precision, for the sake of correcting a theoretical defect not resulting in any practical inconvenience ; and though, with Lord Holt, we say of the common counts, " he was a bold man who first ventured thereat," they have become so practically innocuous that it is well that they were suffered to stand, judiciously pruned of their excrescences.

The next and most glaring instance of vagueness was the allowance of the general issue by statute, and this privilege the commissioners proposed to abolish, but the legislature has not thought fit to follow their advice—why, it is hard to discover.

2nd. With regard to the fiction of colour, and the fictitious and untrue statements in *trover*, *detinue*, and *ejectment*, their abolition has been an unmixed benefit.

3rd. The fault of prolixity has been mitigated by the abolition of *profert* and *oyer*, the general averment of the performance of conditions precedent, and the permission to traverse specially any one of the many facts put in issue by the plea commonly called the general issue. These were recommendations of the commission adopted in the act, and are undoubtedly beneficial changes ; but, on the other hand, the abolition of special demurrers has been found to have been productive of another source of prolixity, viz., the great multiplication of lengthy pleas which, before such abolition, would have been open to demurrer as amounting to the general issue—the only remedy for this is a knowledge by the profession of the science of pleading, which would make men ashamed of such unscientific pleas. We do not hesitate to insist that every student should learn to plead, according to the old laws of pleading. Let, we say, the science be studied and carried into practice, though the penalties attending a breach of its rules have been most properly mitigated.

4th. The old system was accused of unnecessary precision and of the over-technicality of its rules. It was hard enough that a cause which could be decided on its merits should be settled on a question, whether the pleading was ambiguous, double, or argumentative ; but so it was—a defendant might have had a

good defence on the merits, yet if he set it out obscurely, or lumped two defences into one plea, or stated by inference and argument that which he should have stated directly and positively, he was liable to be defeated in the action on special demurrer—special demurrers, consequently, were sacrificed for the abuses connected with them, yet their fall is not of unmixed advantage, for to the distress of the old pleaders we now find two or three defences jumbled into one plea, sometimes in design, sometimes in ignorance. So, too, all kinds of defences are uncovered on the record, which clearly amount to, and might be given in evidence, under a general issue or a simple traverse. Other pleadings, again, it would almost seem, are purposely rendered obscure. For such evils, alas! a remedy is not provided in practice, unless a judge can be brought to believe that the pleading is so framed as to prejudice, embarrass, or delay the fair trial of the action. Now we know that, in many instances, it is extremely difficult, in the hurry of business in chambers, for a judge to arrive at this conclusion, and consequently it is not often that amendments are directed, even when really required. We believe that one—perhaps the true—remedy, ought to be sought in an extended study of the objects and rules of pleading. Our young candidates for the bar should at least read Serjeant Stephen's treatise a little more, and not imagine that, because they can no longer be punished for an infringement of the strict rules expounded by him, that they do themselves or the profession credit by neglecting or despising them. No good lawyer can doubt that he will become the best modern pleader who most conforms to the principles and established rules of pleading. Let him always plead as if a special demurrer were impending over him, and he will soon raise himself above his fellows.

If the judges had somewhat more time at chambers, they might be better able to cause pleadings to be put into a proper shape. Now they cannot be expected to settle, off-hand, points upon which the pages of Meeson and Welsby shew that the courts under the old system dwelt long patiently and earnestly. So far, therefore, as the contest with ambiguity duplicity and argumentativeness is concerned, the weapons of the act are either inefficient themselves, or inefficiently wielded. It would

have been better to have allowed a demurrer, as recommended by the commissioners, if the parties wilfully refused to amend.

5. The act deals with the abuses formerly resulting from the frequency of arrests of judgment, and judgments *non obstante veredicto*, for want of some material averment in the plaintiff's or defendant's pleading, and for remedy permits the suggestion by the party in the wrong of any omitted facts—*i. e.*, facts omitted to be averred in the pleadings—and the result then depends upon the truth or falsehood of such suggested facts. This privilege to a party of crying "jeofails" is a very high privilege, and the courts having determined that, before allowing these suggestions, the omitted facts must be stated in clear and unambiguous language on affidavit, and that the parties must make it clear that they have substantial ground for suggesting the new matter—more than a doubtful ground—and that they must impress the court that there will be a good complaint set up by the amended pleading (if the plaintiff's), or a good defence (if the defendant's), we may be quite sure that no abuse can arise on either side—practically we know that the enactment works well because it drives the objecting party to his demurrer, and that gives an early intimation of the fault. The enactment, however, is confined to omission of material facts—it would not meet the case of a misjoinder, such as the joinder of counts against a defendant as executor, with counts against him in his own right. There can, we think, be no question as to the expediency of putting an end, as far as possible, to objections taken after verdict, often either not thought of before trial at all, or else deliberately concealed till the chance of a verdict had been taken—this at least we know, that the change has worked well in that it has made pleaders more alive to their demurrers.

We may conclude this portion of our subject by a short reference to the subject of equitable pleas and replications, the admission of which was the result of a laudable desire to save expense to both parties in cases wherein a suit at law would certainly be stopped in equity—in a word, to make the principles of one tribunal co-operative with, and no longer antagonistic to, the other. The words of the act on this subject are large enough to let in any defence which shews matter for injunction; but, as

our readers know, the alleged necessity, or rather supposed convenience of the case, has induced the judges to limit equitable defences in courts of law to those cases in which the plea shews that an injunction absolute and unqualified would be granted in equity against the prosecution of the suit ; but wherever something more would have to be done in equity than staying the action, as for instance a reforming of the contract, or taking an account, the courts of law have refused to allow an equitable plea, because they say that they have no machinery for working complete justice. If there be no machinery, however, it could be supplied readily and naturally by a proper development of the master's office. At present, by repudiating the powers which were given to them, that they may do complete justice in any cause, the courts have either stultified the meaning of those who designed the provision for equitable jurisdiction, or have evaded a duty.

Doubtless, the masters of the common law courts have now heavy duties imposed upon them, and they are called upon, among other things, as we shall presently notice, to dispose of matters which ought either to be decided in open court, or submitted to professional arbitration under a revised and more economical system than exists at present. Still, if more masters, or a different species of office, be required to provide machinery, such ought to be forthwith supplied.

With regard to equitable replications, they must support the declaration, as other replications always must do ; and as it was not, by the statute in question, intended to transfer to courts of law jurisdiction over claims whose foundation is equitable, wherever the replication shows this to be the case, it cannot be supported. These equitable pleadings were at first used to a considerable extent, and very queer specimens have come under our observation, in which their authors conferred on the courts of equity, jurisdiction novel and even romantic. Pleadings are now, however, wonderfully sobered in this respect, and are working steadily at their new lessons in equity, and no very alarming consequences, but even benefits, have resulted from the new but too limited privilege accorded to common law courts. These pleadings, however, are not yet models of perfection. Every pleader in these cases seems, and not unnaturally so, afraid of saying too little.

The subject of ejectment occupies a very considerable space in the procedure act of 1852, and yet the clauses really present small novelty ; the change from the old declaration to the modern writ is, of course, sensible. It was time to do away with the ingenious but circuitous mode of getting over the difficulty, that in an ejectment the plaintiff could only recover a term ; but the change, as far as concerns the record, is very small. The old pleadings were short, and the new issue is shorter ; special pleadings were never introduced into this action, probably because the principle was, that in ejectment, the plaintiff was always required to recover on the strength of his own title, and therefore had not, as in other cases, a right to have shewn to him his opponent's defence. At any rate, the disclosure of the titles of the parties on the record would have led to intricacies and difficulties, the mischief of which might have exceeded the advantages. *What little* was here required in harmonizing and simplifying this branch of litigation has been done ; to have attempted more would have been alien to the character of the most practical, able, and successful committee of legislation which we have seen intrusted with an important work—we mean the Common Law Commissioners, by whom the reforms in the procedure and practice of our courts was not only carried out, but who saved us from either of two great and impending mischiefs, rash and ignorant revolution, and timid partial patchwork.

The reforms indeed in pleading, wrought by these remarkable statutes now under consideration, are not even yet fully appreciated by the public, but they are among the very few changes fairly entitled to the name of reform. Lawyers know well, however, that they are the creation, not of a crew of agitating, discontented, dilettanti lawyers, but the calm, dispassionate creations of a happily selected body of men, whose indefatigable industry, rare acuteness, profound learning, and sobriety of judgment, have never been excelled.

Passing from the subject of pleading to that of practice, we cannot fail to be struck by the extraordinary amount of business thrown by the new acts upon a single judge at chambers. One would imagine that this was a tribunal of wonderful efficiency, that its decisions were thoroughly and maturely weighed, that

no haste or confusion was ever perceptible in its acts or judgments. Alas ! it is not so ; our common law judges are wonderful men, but they are men after all, and it requires a person more than mortal to get through the work at chambers with satisfaction even to himself, to say nothing of content to the parties. Any person who has seen the vacation judge at work, must be pained to see what he has to undergo ; from morning till two o'clock, or thereabouts, he hears summonses not attended by counsel ; some of the solicitors and their clerks who are then heard, may be competent to their duties, and aware of the proper limits to which they may approach in propounding their difficulties ; but, however they may assist the judge, their numbers are legion, and some of them bore him, and waste public time, with their ignorance, vulgarity, and importunity ; worse than all, we have many a time seen little office-boys in jackets rushing into the room to ask for time to plead ; two of these small urchins are said to have fought in the august presence of the *late* Mr. Justice Williams, who witnessed the onset with calmness and resignation, remembering how he himself had battled for his clients in days long gone by. At two o'clock come the counsel and pleaders, too often forgetful of the trials the judge has undergone, and they frequently detain him to a late hour in intricate arguments. Now, just let us consider what this work is ; if a judge is trying a cause he has a little respite whilst counsel are talking to the jury, and further, he enjoys the enormous satisfaction of not having to decide after all. He might just doze a little, perhaps laugh a little. If a comic judge, and fond of popularity, he may even amuse the jury and the bystanders by forensic fun or well-precedented joke, which, coming from such a source, is sure of a certain amount of appreciation. At chambers, on the other hand, there is no respite, no levity, but the attention must be alive and at full stretch during the whole time of the hearing of each summons ; if it is not, the judge loses the thread, and cannot decide. We well remember the wonderful triumph over these difficulties gained by Mr. Justice Erle, the last vacation judge ; but we perceived that he required to summon to his aid all his calm judgment, all his subtle intellect, all his never-failing attention, to accomplish it ; and we think that, on many occasions,

his spirit must have been vexed, and his well-commanded temper tried, when he strove to work his way through such a chaos. In a word, the fifteen judges have too much imposed upon them (and their clerks are little better off in this respect) by the vacation summonses, and at other periods of the legal year the task is felt severely. Now, it would be easy enough to remedy this evil—for evil it is—by simply providing an additional master, who should have a competent knowledge of pleading and practice, for each court, to take all ordinary summonses, referring such as unexpectedly should be found to involve difficulty to the judge. In times of extraordinary pressure this has been done, but it is an exception, not the rule. It is quite absurd to say that the common summonses for “particulars,” “time to plead,” to “plead several matters,” and the like, require the attention of a judge, and yet they are allowed to occupy his time; while a clumsy and ineffectual expedient to shorten proceedings is resorted to, by imposing a fine of five shillings upon every attorney who takes in counsel, the ostensible ground being to save the judge from what in fact it lays him open to, verbose disquisition. This is unfair both to the client and judge. If the master, as we have suggested, had the discretion of referring cases to the judge, those so referred might safely be pronounced “fit for counsel.”

Let us now proceed to pass rapidly in review some of the more prominent enactments, other than those relating to pleading, which are to be found in the Common Law Procedure Acts 1852 and 1854; and first, although one might have supposed that the first clause of the act of 1854, allowing the parties to submit questions of fact to the judge instead of the jury, would have been received with open arms, yet for various reasons, elsewhere alluded to, it is a dead letter.

Very different has been the reception of the compulsory arbitration clauses, which we have before referred to. At one time, indeed, the masters had so many references before them, that it became almost necessary for the parties to agree upon a non-official arbitrator. A suitor obtained perhaps an appointment from a meeting before the master, and when he asked for a second day, he could not procure it to be fixed at a less interval, perhaps, than three weeks or a month, by which time it was

highly probable that, although the evidence might be on the notes of the master, he would have wholly forgotten the demeanour of the witnesses, and all other incidents at the former meeting. To many of the masters, too, the work was a novelty, and the satisfaction with their decisions has not been so marked as could have been desired. It would have been a better plan to have referred to barristers selected from each circuit, by the senior judge of assize, of a sufficient number to ensure continuous sittings, and under a regulation that no barrister should have more than one reference pending before him at one time—this, with an entire revision of the fees payable now on arbitration, and a restriction on the charges generally, would produce, we are certain, far better results.

Another impediment to references arises from the (practically speaking) finality of the awards. This is a serious matter when the amount in dispute is considerable; and we think it is open to consideration, whether it would not be well to confer on a judge the power to order re-hearings, analogous to rules for new trials.

The alterations as to speeches to the jury were conceived in a spirit of fairness; but they, in many instances, operate as a very serious infliction on the judge, jury, and suitors in waiting.

Passing minor though not unimportant changes, we come to the new enactment as to interrogatories. It was undoubtedly a move in the right direction, that a party should no longer have to resort to a court of equity in aid of a suit at law; and yet we much doubt if the privilege of interrogating parties to the suit has borne the fruits expected from it. We fancy that we have detected symptoms of disapproval in some of the judges, which we have no right to suppose arises from prejudice. When we look for the real cause of their supposed disapprobation, we think we shall find that it is less one of principle than of practical results. Now, first, it is quite clear that interrogatories are sought to be administered in a vast number of cases in which they are wholly unnecessary—this, we may observe, is the height of imprudence; an interrogatory cuts both ways, for, whether or no it extracts what your opponent knows, it certainly shows what you want. Secondly, though common law interrogatories are far more concise than those used in equity, many are, and in the first instance

especially, were very irrelevant, and in some cases proposed with no other object than to insult the party—this was especially so in actions on bills of exchange ; and, lastly, many are very loosely drawn, and contain questions which the courts have over and over again pronounced inadmissible. The fact is, that every one in an attorney's office fancies he can draw interrogatories, forgetting what was once said by the late Vice-Chancellor of England, that the preparation of interrogatories was the most difficult thing counsel had to do. The consequence of all this is, that the judges get disgusted with the specimens laid before them, and sometimes make a wholesale onslaught on them, and at others seem to pass them, as it were, in desperation. A remedy has been proposed, which we can hardly think would prove effectual, namely, that every set should, if not drawn, be at least certified and approved by counsel, with an intimation that the approval shall involve something approaching responsibility. At present we cannot declare interrogatories to be a complete success.

The 58th section of the act of 1854, providing for inspection by the jury, the parties, and witnesses, of real or personal property, the inspection of which may be material to the proper determination of the question in dispute. This enactment has worked silently but most beneficially. We are aware of two cases to which it has recently been applied by judges at chambers—the first was in a case wherein the question was whether a horse let to hire had been returned unblemished; and the second in an action on a builder's bill, when the defendant, for whom the house had been built, refused to allow the builder to enter to take the measurement of the work.

The garnishee clauses, although a novelty in the superior courts, were no novelty in principle; the custom of London was well known. The main difference between attachment in the courts at Westminster and that of the mayor's court may be said to consist in the fact, that a judgment in the superior courts is a condition precedent to an attachment therefrom—the clauses had the recommendation of fairness and common-sense, and have worked well and satisfactorily.

The restriction of the remedy, by statutory mandamus, to cases in which there is a duty of a public nature, or a duty created by

statute, in the fulfilment of which the plaintiff is interested, has given to the mandamus clauses a very limited effect. Whether advisable or no we do not here stop to inquire, but certainly the legislature has not yet given to the common law courts power to decree specific performance.

Perhaps one of the most beneficial powers conferred on the common law courts by the act of 1854, was that of issuing injunctions, and thus avoiding the necessity of trying the right in one court, and getting the effectual remedy in another. It has received a liberal construction, and has been held to extend to a case wherein the effect of the injunction must be more than negative, and where obedience imposes on the defendant the necessity of doing an act, and not merely ceasing to do what was complained of. In conclusion, we feel assured that the time is not remote, if it has not yet arrived, at which the changes worked by these acts will be appreciated by all reflecting men, whether lawyers or laymen. To the former they need no recommendation; to the latter it will be enough for them to know apart from the prejudice or ignorance of a jury, or slip of the judge, that a cause will henceforth be decided on its merits alone. To the mercantile classes it may of a truth be told, that under the arbitration clauses they have, if they are minded to resort to them, their tribunals of commerce, inasmuch as they may now consent to refer their disputes to those whom they imagine most competent to settle them; and generally it may be safely affirmed that a suit at law is no longer to be apprehended for its vexatious expense, or ridiculed for its unnecessary technicality.

ART. V.—CIVIL AND CRIMINAL JURISDICTION OF
GREAT BRITAIN IN THE OTTOMAN EMPIRE.

THE Report of the Select Committee on the Consular Service and Appointments, lately presented to the House of Commons, affords a fitting opportunity for calling the attention of the profession, and of all who feel an interest in the extension of English institutions, to a peculiar, exceptional, and very important jurisdiction, exercised by the Crown over its own subjects in the territories of the Sultan ; a jurisdiction which is exclusive in all cases, civil and criminal, where British subjects alone are concerned, and which ousts the action of the local tribunals in every instance in which a subject of the Porte is not a party to the suit. The question appears to have possessed little interest for the public until lately—indeed, we believe that very few people in England were at all aware even of the existence of such a system ; and the members of the legal profession, if they knew more about it than the laity, can hardly be expected to have felt much concern in the matter, for this jurisdiction until very recently was exclusively, and still is chiefly, in the hands of persons indebted to nature and accident alone for any fitness possessed by them for its exercise. The establishment, however, of a professional tribunal at Constantinople, with an important original civil and criminal jurisdiction, and with powers as a court of appeal in civil matters over the British consular courts throughout the Turkish empire, cannot fail to be a matter of interest to lawyers especially ; and it is peculiarly important to ascertain how far the English *system* of law, using that word in a larger and more general sense than as denoting the provisions of our statutes and the decisions of our courts, is capable of satisfactory extension to a sphere of action so far removed from national feelings, habits, and principles, as one of the great cities of the Levant.

The case is quite peculiar, for in this instance there is not an inch of territory to support the jurisdiction, and there exist within the same limits no less than seventeen different national juris-

dictions, independent of each other, and all independent of the local law of the country in which they are exercised. Many of these have their legal systems regulated by codes more or less in accordance with the Code Napoléon. Many have, and always have had, professional persons, "*hommes qui ont fait leur droit*," at the head of their judicial establishments; some of them are possessed of very considerable criminal, and almost all of unlimited civil jurisdiction as courts of first instance; and the subjects of all are brought from time to time, in the ordinary course of human affairs, into relationship with British subjects, resulting in proceedings of a civil or criminal character, which have to be regulated and decided, not only so as to ensure justice, but also with due regard to national feelings, usages, and even prejudices; for, without co-operation in the execution of judgments, all proceedings in *mixed* cases must of course prove nugatory. It is therefore in so anomalous a state of circumstances, and in the presence, and subject to the action, of so many different and often opposing jurisdictions, that the principles which have gone to build up our English law in its own essential spirit, and in its administration, are, as it were, put on their trial; and it is impossible not to see that the experiment is one of great severity, and should therefore be looked upon with proportionate satisfaction if it should turn out successful. Here will be tested every peculiarity, every technical obstruction to the elucidation of truth, every forced observance of the letter of law which may disfigure our jurisprudence, and tend to defeat the spirit of justice. Here, if any where, must the inherent advantages of continental systems of codified law become apparent over our own, if these advantages do really exist. With the view, therefore, of ascertaining how the truth stands in this matter, the working of the Supreme Consular Court at Constantinople is entitled to our earnest attention. Indeed, to institute this comparison, it is not always necessary to look beyond the cases within the exclusive jurisdiction of the court itself; for in civil cases between Ionian citizens, the Supreme Court, in common with all consular tribunals in Turkey, is instructed to administer Ionian law, which consists of a sort of *abrégé* of the French codes.

Some brief account, then, of the nature and extent of the juria-

diction of the court at Constantinople, and of the consular tribunals elsewhere in the Sultan's empire, may be acceptable to our readers, and will certainly have the advantage of sparing them the tedious process of gleaning from the formidable blue book to which we have referred, the information relating to consular jurisdiction in the Levant.

It is not easy to imagine a more ludicrous contrast between pompous pretension and real weakness, than is suggested by a glance at those capitulations or articles of peace between Great Britain and the Ottoman empire, which form the basis of the Queen's jurisdiction over her own subjects in Turkey: yet they date from a time when the Ottoman empire was possessed of some real strength, and when that strength was greatly exaggerated in the estimation of the Western powers. For any sovereign or independent nation to give up the exclusive right of civil or criminal jurisdiction over persons residing on its own territory, nay, in the very capital of the empire, seems to express the last degree of political degradation; but it would be uncandid and untrue to ascribe these concessions to such causes at the time when they were made, although there can be no doubt that conscious weakness is the only cause at the present day which prevents the Porte from openly attempting to abrogate them totally. The privileges which were then granted, and which are really as indispensable to the security of British interests now, as they were in the time of King Charles the Second, seem to have been conceded partly (let us say it) from a sense of justice, and a conviction that nations who were unbelievers ought not to be obliged, even in Mohammedan countries, to be judged by the law of the Koran; partly from a spirit of ignorant contempt, which prompted the Turks to look with great indifference on the questions which might arise among a few traders resident in the country; and partly also from a want of foresight, intimately connected with the last-mentioned feelings, of the future destinies and relative position of their own race and the nations of Europe. Will our readers pardon us if we stop to quote the opening passage of these capitulations, "as agreed upon, augmented, and altered at different periods, and finally confirmed by the treaty of peace, concluded at the Dardanelles in 1809."

"The command, under the sublime and lofty signet which imparts sublimity to every place, and under the imperial and noble cipher, whose glory is renowned throughout all the world, by the emperor and conqueror of the earth, achieved with the assistance of the Omnipotent, and by the especial grace of God, is this :—We who, by divine grace, assistance, will, and benevolence, now are the king of kings of the world, the prince of emperors of every age, the dispenser of crowns to monarchs, and the champion, Sultan Mehemed, son of Sultan Ibrahim Chan, son of Sultan Ahmed Chan, son of," &c. &c. Sparing our readers the genealogy, we proceed to the preamble, which states that "the most glorious amongst the great princes professing the faith of Jesus, and the most conspicuous amongst the potentates of the nation of the Messiah, and the umpire of public differences that exist between Christian nations, clothed with the mantle of magnificence and majesty, Charles the Second, King of England, Scotland, France, and Ireland, (whose end terminate in bliss!) having sent an ambassador in the time of Sultan Murad, (whose tomb be ever resplendent!) of glorious memory, and full of divine mercy and pity, with professions of friendship, sincerity, devotion, partiality, and benevolence, and demanding that his subjects might be at liberty to come and go," &c. "As such privilege, therefore, had been granted to the kings and sovereigns of France, Venice, and Poland, who profess the most profound devotion to our most eminent throne," "it was granted to him, that his subjects and their interpreters might safely and securely come and trade in these our sacred dominions. And the queen of the above-mentioned kingdoms having heretofore also sent a noble personage with presents to this victorious Porte, which is the refuge and retreat of the kings of the world, the most exalted place, and the asylum of the emperors of the universe (which gifts were graciously accepted), and she having earnestly implored the privilege in question, her entreaties were acceded to, and these our high commands conceded to her." Then follow the articles of capitulation, seventy-five in number. Of these it is only necessary to refer to a few. Article XV. declares, "That in all litigations occurring between the English, or subjects of England, and any other person, the judges shall not proceed to

hear the cause without the presence of an interpreter (official dragoman), or one of his deputies." Article XVI. states, "That if there happen any suit or other difference or dispute amongst the English themselves, the decision thereof shall be left to their own ambassador or consul, according to their custom, without the judge or other governors, our slaves, intermeddling therein."

Article XXIV. provides (in more general terms than Article XV.), "That if an Englishman, or other subject of that nation, shall be involved in any lawsuit, or other affair connected with law, the judge shall not hear nor decide thereon until the ambassador, consul, or interpreter shall be present; and all suits exceeding the value of four thousand aspers (£2, or thereabouts), shall be heard at the Sublime Porte, and nowhere else." Passing over Article XXXIII., which recites that, "differences having heretofore arisen between the ambassadors of the Queen of England and King of France," touching certain affairs, "both parties had presented memorials at our imperial stirrup;" we find it provided by Article XLII., "That in case any Englishman, or other person navigating under their flag, should happen to commit manslaughter or any other crime, or be thereby involved in a lawsuit, the governors in our sacred dominions shall not proceed to the cause until the ambassador or consul shall be present; but they shall hear and decide it together, without their presuming to give them any the least molestation, by hearing it alone, contrary to the holy law and these capitulations." The Articles conclude, "We do hereby promise and swear by the One Omnipotent God, the Creator of heaven and earth, and of all creatures, that we will permit nothing to be done contrary to the tenor of the articles and stipulations heretofore made, and these Imperial capitulations." On the foundation afforded by these concessions, the English jurisdiction over its own subjects in Turkey has arisen; it was continually exercised in the time of the Levant Company by the consuls appointed by that body; and when the company's possessions and property were transferred to the Crown, under the provisions of the act 6 Geo. IV., cap. 33, in the year 1825, the authority possessed by the company's consuls was vested in those appointed by the king. In 1835 a Select Committee of the House of Commons reported, "That the civil and criminal

jurisdiction of British consuls in the Levant seems to require to be better regulated and defined, and that your committee recommend this subject to the attention of Government, with the view of obtaining from Parliament the necessary powers for that purpose." The act 6 and 7, Vict., cap. 94, known as the "Foreign Jurisdiction Act," was passed in the year 1843, and declares, "That it is and shall be lawful for her Majesty to hold, exercise, and enjoy any power or jurisdiction which her Majesty now hath, or may at any time hereafter have, within any country or place out of her Majesty's dominions, in the same and as ample a manner as if her Majesty had acquired such power or jurisdiction by the cession or conquest of territory." The act gives to every thing done in pursuance of any such power or jurisdiction, in any place out of her Majesty's dominions, the same validity and effect within her dominions, as if it had been done according to the local law then in force within the place; and provides, "That if in any suit or other proceeding, whether civil or criminal, in any court, ecclesiastical or temporal, within her Majesty's dominions, any issue, or question of law or fact shall arise, for the due determination whereof it shall be necessary to produce evidence of the existence of any such power or jurisdiction, or of the extent thereof," the judges are to frame questions addressed to a Secretary of State, and his answers "shall be final and conclusive evidence in such suit or other proceedings, of the several matters therein contained, and required to be ascertained thereby." This act was followed by two orders in council; one in the same, and the second in the ensuing year, 1844, the former of which provided for the exercise by consuls, in the Ottoman empire, of their customary jurisdiction, and the latter set forth the extent of criminal jurisdiction confided to these officers, and regulated the manner of proceeding.

As these orders still remain in force, and are acted on by consuls every where except in Constantinople, for which place special provision has been made by the establishment of a supreme court, in November, 1857, it may be proper to say a few words, both as to the criminal and civil jurisdiction, which they are supposed either to have confirmed or created. And first, as to criminal matters, it is provided, "That any act coming under her Majesty's juris-

diction as aforesaid, and which, being done in any part of her Majesty's dominions, would render the agent or his abettors amenable to punishment, shall, when done by British subjects within the dominions of the Porte, be considered as criminal to the same extent, and shall be liable to be inquired of, tried, and punished," as directed by the order—that is, at a consular court, before the consul alone, with imprisonment not exceeding three months, or a fine not exceeding one hundred dollars; or at a consular court in which the consul is assisted by two or four assessors, with imprisonment not exceeding twelve months, or a fine of two hundred dollars. The proceedings at these consular courts, which are declared to be courts of record, are to be had, as far as possible, in conformity and correspondence with the proceedings which, in like cases, would be had according to the law and practice of England; but the assessors have no such power as a jury, but may record their dissent from the conviction or amount of punishment awarded. It has also been provided, by an order in council made in the year 1847, that persons convicted at consular courts of serious offences, as well as those who have been twice convicted, may be deported from the dominions of the Sultan; and this power is also given when the party who is convicted of any crime or misdemeanour endangering the public peace, or who is proved to be about to commit a breach of the peace, shall be unable to find good security for his future conduct. The civil jurisdiction of the ordinary consuls is only defined by the word "customary," which would seem to be vague enough; in fact, it was and is exercised to an extent which may fairly be called unlimited. Every civil suit between British subjects is decided by the consul of the place, without regard to the amount in dispute, or to the intricacy or general importance of the questions which it may be necessary to determine.

Most consuls, although not bound to do so, have been in the habit of calling in assessors in civil cases, and in all instances an appeal lay from their decisions to Constantinople. But when our readers are informed that this appeal lay to the ambassador, or strictly, in the first instance, to the consul-general, both of course unprofessional men, and with more business of their own on their hands than they could be reasonably expected to manage, it will

readily be understood that this remedy for error must in all cases have been uncertain and unsatisfactory. But, besides this unavoidable evil, it is not too much to say that, in nine instances out of ten, no materials were ever sent up on an appeal from which any judge or court could act with the least security or satisfaction. Huge masses of papers, drawn mostly by pseudo "*avocati*," filled with assertion and counter-assertion, with general and particular abuse, and branching into the most extraordinary irrelevancy, formed the pleadings; the judgment, generally a lengthy document filled with the so-called grounds of decision, seldom expressed the facts which had been proved, and never how they had been proved. Indeed, the monster evil which the whole proceedings laboured under, and which appears to us, under favour, to have been derived from a close acquaintance and considerable admixture with certain foreign systems of procedure, was a complete want of acquaintance with the nature and value of *evidence*, or rather, perhaps, with the absolute necessity of the existence of evidence, to decide any question of fact not distinctly admitted between the parties. It was not the general custom to take evidence on oath in civil matters, nor indeed, for the most part, to take oral testimony at all; no professional assistance of the least value could be obtained, and it was apparently not even attempted to extract any issue or issues of law or fact from the so-called pleadings, until the consul and his assessors set seriously to work to consider the judgment.

Now, we are of opinion that the consuls themselves were not to blame for these evils, which belonged to a false system, and not to themselves as individuals. It was seemingly considered that the principles of English procedure were too abstruse and technical, and were otherwise not adapted to the circumstances of the country; and had it been contended that the English system, as it existed some years ago, threw obstacles in the way of the reception of evidence and discovery of truth, which must have acted with peculiar hardship in countries where the law was little known, and where general ignorance was great, we should have been the last to deny it; but unfortunately every other jurisprudence was in essential points more opposed to the free reception of real testimony than the English. Thus, the existing code of

France, and all those which are derived from it, have retained the rules, excluding the sworn evidence of all interested parties, in their fullest vigour. The result is certain, and (even in civilized countries with able tribunals) mischievous in a high degree; much is said, listened to, and acted on under no sanction and no restraint, which would be valuable (as it is often the only available) evidence if regularly admitted, freely sifted, and maturely weighed. The temptation to strain rules when they obviously prevent the discovery of material truth, is too great to be resisted, and it is well that it should be so; but the tendency of undue restraints on evidence where the tribunal is unprofessional, is to confound in the mind of the judge all rules and restrictions whatever, and to make him inclined to take and act on assertion, almost, if not altogether, as freely as if it were proof. This is instanced in a remarkable degree by the judgments of the consuls in civil matters, and the mischief seems to have continued after the cause of it had ceased, and the natural, simple, and liberal principles of English civil procedure had been enabled, by judicious reforms, to manifest their adaptability to the most varied states of society. Nothing can more strongly, in our opinion, exemplify the mistake which was committed by Levantine consuls, in not adhering as nearly as they could to the principles of English procedure in civil matters, than the fact, that in such criminal business as came before them, where, both by positive order and a sort of natural intuitive English feeling, they did adopt this course, they are said to have conducted their proceedings with regularity, and to have done their work satisfactorily; it appears surprising that they should not have perceived that the same rules which were found useful in one class of cases for the discovery of truth, would be equally useful in another. Of course, criminal cases are generally much more simple than civil cases, and the issue is ready at hand; but it seems not unnatural to suppose that a man who had tried, with satisfaction to himself and the public, a case of larceny, to which the plea was not guilty, would think that the best way of determining an action for goods sold and delivered, to which the plea was in substance "never indebted," would be to have the case proved in a somewhat similar manner. Yet in practice in the latter case, the ordinary course

consisted in an interchange of papers for an indefinite period of time, all tending to obscure the issue which the first petition and answer would have at least afforded materials for settling, if they did not strictly develop it. The Russian war, which largely increased the business, both civil and criminal, at Constantinople and elsewhere in the East, led to the serious consideration of the consular jurisdiction, and to the establishment at Constantinople of the supreme consular court. This appears to us, from the evidence of Mr. Hammond before the committee, to have been in part a concession to the immediate necessities of the case, and in part so far an experiment, as to be directed specially to acquire information for the Government, on the subject of the nature and extent of the jurisdiction necessary for the wants of British subjects throughout the Turkish empire, and to discover the best mode in which, consistently with our rights under the capitulations, that jurisdiction could be exercised.

The whole of the judicial powers and duties of the consul-general at Constantinople are vested in the judge of the court, and an increased criminal jurisdiction is given to the highest extent, short of capital punishment, which the law of England knows. A jury is introduced in cases of felony, and the proceedings are directed to be, as nearly as local circumstances will permit, in accordance with the English procedure. Moreover, the court, besides its original jurisdiction within the limits of the consulate-general of Constantinople, is a court of appeal from the decisions in civil matters of all consuls-general and consuls within the Ottoman empire, including Egypt. The appeal from the judge is confined, as of right, to cases where the subject-matter is above the value of £1000, and lies to the judicial committee of the privy council on an appeal case and answer, with the judge's notes of evidence and judgment. Consuls in Turkey are bound to execute the judge's writs and orders, and this officer is directed to establish rules of procedure for his own and all consular courts, which, when approved by the Secretary of State, are to be published and enforced. He is also directed to establish tables of fees, and to allow costs as between parties according to an established scale. The consuls are, as we learn from the evidence of Mr. Consul Calvert and others, directed and encouraged to

apply to the judge for advice and direction in all matters connected with their judicial and magisterial functions; and it would appear that, even during the short time which has elapsed since the establishment of the court, they have freely used this permission, and bear grateful testimony to the advantage they have derived from it.

The duties which the judge has to perform under the provisions of the order in council, numerous and varied as they appear from this detail, are in fact much more extensive and difficult than this enumeration would imply. Although in the capitulations the ambassador is mentioned, yet the jurisdiction conferred by the Crown is exclusively in the consuls or in the judge, who is made for that purpose a consular officer. He has then the charge of seeing to the rights and interests of all British subjects, including Maltese and Ionians, who are either plaintiffs or defendants, prosecutors or parties accused in the Turkish courts, and is bound to attend by his dragoman at the several steps in every such proceeding. He has to receive the dragoman's reports, to give him instructions how to proceed, to direct him when to assent and when to dissent from the proceedings and judgments of these courts, and has himself to procure, by representation to the ambassador, such protection and redress as he can from the government, against any infraction by these courts of the rights secured to British subjects by treaty. He has to appoint *British* mixed commissions, that is, courts appointed by the international custom of the place, to hear civil causes wherein any foreigner is plaintiff and a British subject defendant, to "homologate" their decision if regular in form, and hear and decide appeals from them on the merits; he has to try all cases in which a foreign or even Ottoman plaintiff has duly submitted to the jurisdiction of the court, in a case where a British subject is defendant; he has to decide cases between Ionian citizens according to the provisions of the Ionian law, and to give effect to judgments of the Ionian courts; he has to act as a commissioner in bankruptcy. The whole of the criminal cases in which a British subject, Ionian or Maltese, is charged with any offence, are, unless the prosecutor is a Turkish subject, exclusively within the jurisdiction of his court; and he is charged with the control

of the British prison at Constantinople. In addition, he has to dispose of the complaints which arise from misconduct on board British ships. It is right to bear in mind, before concluding this catalogue of duties, that the civil cases which come before the court are often of great magnitude and importance, as well as difficulty—Constantinople being a great mercantile place, and affording, as we learn, a plentiful supply of “shipping cases,” which, whether the amount in dispute be great or little, are pretty certain to cause a fair share of anxiety and responsibility to any conscientious lawyer who has to decide them. We also find that many cases are of that description which would in England necessarily belong to the Court of Chancery, and that, in one shape or another, equitable relief has been asked for and granted, as a part of the customary jurisdiction in the Levant. The order in council which provides for the appointment of the judge, creates two other offices connected with the court—one, that of legal vice-consul cancellier, and the other of law-clerk, or secretary; the former is declared to be the registrar of the court; but beyond this no specific mention is made of their functions. We gather from Mr. Hammond’s evidence, that the legal vice-consul performs the ordinary duties of a police magistrate, and hears and disposes of small claims summarily. Both these officers (as well as the judge of the court) are members of the English bar, and it is probably left for the present to the judge to avail himself of their assistance, in such manner as may be found most conducive to the despatch of public business. It is with no small satisfaction that we learn that, since the establishment of this court, foreigners are anxious to submit their claims to its jurisdiction; indeed, the only complaint which has reached the English public on the subject of the new tribunal, is the ease with which a foreigner can obtain justice against an Englishman in Constantinople, compared with the partiality, and tedious delay, which characterize the tribunals of other foreign consulates. We venture to think that all reasonable men will agree that, although this may be an excellent reason for pressing on other powers the propriety of taking steps to correct these evils, it would be a poor excuse for refusing to entertain the suit of a foreigner, who binds himself to abide by the judgment, and

gives a deposit or security for costs. It is one, amongst other penalties, which an Englishman must be content to pay for the character and position of his country; and, in point of fact, there is no way of obviating it, without bringing great disgrace on the most valuable institutions of our nation. When a Frenchman or Austrian brings an action against an Englishman at Constantinople, he would in the ordinary course be entitled to name, through his consulate, one commissioner, and the British authorities, or the defendant through them, may name two others. These three are supposed to hear and decide the case, and the decision is "homologated"—that is, given the force of a consular decree by the British consul-general, or now by the judge. This "homologation" is of right, if the proceedings are regular on the face of them, and the appeal lies to the judge on the whole case. Now, in fact, if the plaintiff is right in his suit, the British defendant obtains a great delay, and considerable expense is incurred on both sides. The commissioners have been accustomed to look on themselves as advocates of their respective countrymen, and the proportion of two to one carries the day; their judgment, if wrong, is set aside by the court, and the case is generally re-heard by the court itself, by the consent of both parties, who are appalled at the notion of going back to a new commission. Seldom, indeed, is there any thing on the record of the proceedings of one of these pseudo-arbitrations which could enable the court to enter up final judgment; so that, in fact, the whole case has to be heard over again in some way or another, and the British subject, if unsuccessful, has to pay the costs. On the other hand, if the plaintiff has procured the assent of his own consulate to his submission to English jurisdiction, the case is heard before the court as if both parties were English; and, as far as we can learn, few foreigners are found to object to the English procedure, as exemplified by *vivâ voce* evidence, rejection of hearsay, and sharp cross-examination. Foreign plaintiffs generally have recourse, in heavy cases, to some one of the four English barristers who practise in the court; but sometimes their cases are conducted by Italian, French, or Greek lawyers, and the court is addressed, at the option of the party speaking, either in English, French, or Italian. Although, in the absence of any thing to make the contrary plain, parties will be

taken to have contracted according to English law, as modified by the custom of the Levant, yet, if they have expressed their intention to contract according to the provisions of a foreign code, the court will construe the contract accordingly. One of the great features which seems to be most appreciated by the public in the proceedings of the court, is their absolute publicity, and the speedy delivery of judgment in open court; things, indeed, of which the mention, as distinctive characteristics, may excite a smile among ourselves, but which, to the Levantine community, are as novel as they are satisfactory. Up to the time of the establishment of the Supreme Consular Court, the cases were heard in the presence of the parties alone, and the judgments made their appearance in writing, after periods sometimes of considerable length. An unprofessional judge naturally took time to consider points which a lawyer can decide on the spot; and there is scarcely more value put by mankind on justice itself than on its speedy administration. If the information which we have be correct, the period which elapses between the presentation of a petition and the hearing of a case is moderate enough. Eight days from service of the petition are allowed for an answer, and the time will be extended on application, shewing a reasonable cause. Parties not answering, or answering in such a manner as to raise no intelligible issue, may be brought before the court on a summons to settle issues; or, in the former case, the plaintiff may set down his case for hearing, and the absence of an answer is treated as a general traverse of all the material facts in the petition. Special defences are in most cases required to be set up by answer, and where the breach of this rule makes any adjournment necessary, it is granted only on payment of costs. Causes are set down in a general list, and transferred to the hearing list in their turn; interlocutory applications are made by motion, and, when the matter cannot be treated *ex parte*, the form either of a rule to shew cause, or of notice of motion, is adopted, according to the nature of the case. We have understood that much importance is attached to the facility of access by suitors to the superior officers of the court, a matter absolutely necessary in the Levant; but our space will not permit us to discuss this and other matters further at present. We purpose at a future time to recur to some subjects of interest with regard to this new tribunal.

ART. VI.—*The Copyhold Enfranchisement Manual*. Second Edition. By ROLLA ROUSE, ESQ., Barrister-at-Law. Butterworths : 1858.

SEVENTEEN years ago the Legislature commenced an attack upon the copyhold system of tenure. The Copyhold Act, 1841, contained voluminous provisions for the conversion of servile into free tenure in a wholesale way, a manor at a time. The framers of the act pictured to themselves, with loving minuteness of detail, the lord of the manor calling together his tenants in a paternal way, and proposing to them enfranchisement from their antiquated burdens ; the tenants, on the other hand, flocking to the summons, and unanimously consenting to take advantage of the boon. The steward, too, was represented consenting to the commutation of his fees, breaking the magic wand with which he had been wont to induct the tenants into their holdings, preserving only his roll as a monument of antiquity. Supposing, however, that in a manor there were a man with soul so base as to prefer to be a slave, some genuine descendant of the mediæval villain, glorying in his chains, then, in order that none such might stand in the way of enfranchisement, it was enacted that the lord, with three-fourths of the tenants of the manor (the interest of the lord and tenants being not less than three-fourths in value of interest), might by their agreement bind the recreant, and effect the proposed reforms. The old rents, fines, and heriots, might be commuted for an annual rent-charge, and a fine not exceeding five shillings on death or alienation, the former varying beautifully with the price of corn ; or, instead of the rent-charge, the commutation might be for payment of a fine on death, or alienation, or at fixed periods, and other modes of commutation were provided to suit all tastes. All requisite formulæ having been gone through, the tenants might throw up their caps and congratulate themselves, that though their lands still remained parcel of the manor, and were held by copy-of-court roll as before, yet they had ceased for ever to be subject to the customs of borough English, or gavelkind, or any other custom-

ary mode of descent, or to any custom relating to dower or free-bench, or tenancy by curtesy, and that they would be held in such respects as lands in free and common socage. Socage ! what a comfortable word to a tenantry groaning under heriots and feudal exactions ! On the other hand, the lord might sit in his hall, and, like the miser in Horace, gloat over his escheats, fairs, markets, appointments, franchises, royalties, rights, liberties, and privileges of chase and free warren, and all ancient piscaries, fisheries and rights of fishing, rights in mines, minerals, and quarries, in or under the lands, none of which were to be touched or violated, unless expressly commuted.

In addition to the process above-mentioned, the Act of 1841 provided others to meet different cases. There were *scheduled commutations* when twelve persons, being tenants, or all the tenants of the manor at the same time, agreed with the lord for commutation, and the agreement did not include apportionment ; in such case a schedule might be prepared by the steward, and delivered by him to the commission, and confirmed and sealed by the commission, and thus the wishes of all parties might be crowned. Again, supposing twelve tenants, or all the tenants of the manor, should at the same time agree with the lord for enfranchisement, in that case sect. 56 provided that the desired object might be attained by a schedule of apportionment, specifically agreed on between the lord and tenants ; and, when not so agreed on, by a schedule of apportionment, to be prepared by the steward, and delivered by him to the commissioners, such schedule to be, in either case, confirmed and sealed by the commissioners.

Such were the magnificent dreams of the framers of the Copyhold Act. The voluntary principle, however, which had been, it must be confessed, involuntarily adopted by the promoters of copyhold legislation, was not found to work particularly well. Neither lords nor tenants showed promptitude to take advantage of the permissive clauses of the act. Stewards looked on with malignant grin. Two small amendment acts were passed in 1843 and 1844, for the purpose of greasing some refractory wheels in the primitive machinery, but wholesale enfranchisement proved impracticable.

Something was done in the way of enfranchisement of individual tenants, for which the act supplied facilities not existing before. But it was only in the enfranchisement of the property of the church that any thing like a success was obtained. The promoters of the abolition of copyhold tenure, at length, in 1852, succeeded in getting through the legislature a more drastic measure. By the first section of the Act of that year, it was enacted, that "at any time after the next admittance to any lands, which shall take place on or after the first day of July, 1853, in consequence of any surrender, bargain, and sale or assurance thereof (except upon or under a mortgage, in cases where the mortgagee is not in possession), or in consequence of any descent, gift, or devise, and whether such surrender, bargain, and sale or assurance shall have been made, passed, or executed, or such descent shall happen, or such gift or devise shall take effect before or after that day, it shall be lawful for the tenant so admitted, or for the lord, to require and compel enfranchisement, in manner hereinafter mentioned, of the lands to which there shall have been such admittance as aforesaid, provided that no such tenant shall be entitled to require such enfranchisement until after payment or tender of the fine or fines, and of the fees consequent on such admittance; provided also, that if from any cause such enfranchisement shall not take place until some event shall have happened which may require a second or any subsequent admittance, such second or subsequent admittance shall be made, with all the rights incident thereto, as if this Act had not been passed, and it shall be competent for the lord or tenant to require and compel enfranchisement upon or after such second or subsequent admittance, in the manner hereby provided for enfranchisement upon the next admittance." How this wordy and cautious clause got into its present shape, what conflicting views, what cunning attempts at nullification or stultification, what parings-down, what additions or amendments it may have been the ultimate result of, we are not able to say. It contains, however, one important leading idea: after a certain defined time, under certain circumstances, it shall be lawful for either lord or tenant to compel the other to submit to enfranchisement. Previously either party could refuse altogether to concur, and thus

the tenant was entirely at the mercy of the lord, who could insist upon being paid for his compliance, and all fair bargaining was out of the question. Here, however, a compulsory power is introduced, and a foundation laid for an equitable adjustment of claims. The power is so entangled with cautions as somewhat to impede its practical utility, but the effect of it has been marked and decided. This will appear from the following table, taken from the report of the copyhold commissioners, dated December 1857, a most significant document. It shows the number of enfranchisements and commutations which have been ratified by the commissioners during seventeen years, distinguishing the ownership of the manors into clerical, collegiate, and lay. The clerical manors, it will be observed, have been more or less under the influence of the commissioners of church property; colleges and lay-owners have been left to their own spontaneous action.

Years.		Clerical.		Collegiate.		Lay.		Total.
1841	...	1	...	—	...	—	...	1
1842	...	9	...	—	...	3	...	12
1843	...	15	...	1	...	13	...	29
1844	...	24	...	—	...	15	...	39
1845	...	44	...	—	...	12	...	56
1846	...	49	...	—	...	7	...	56
1847	...	38	...	1	...	13	...	52
1848	...	16	...	1	...	8	...	25
1849	...	19	...	1	...	10	...	30
1850	...	27	...	1	...	9	...	37
1851	...	31	...	2	...	31	...	64
1852	...	31	...	—	...	13	...	44
1853	...	36	...	6	...	16	...	58
1854	...	59	...	11	...	61	...	131
1855	...	42	...	32	...	146	...	220
1856	...	46	...	23	...	162	...	231
1857	...	52	...	21	...	230	...	303

Thus it appears that, in the four years in which the compulsory clause has been in operation, 885 commutations and enfranchisements have taken place, against 503 in the preceding thirteen years. Out of the total number of collegiate and lay commutations and enfranchisements, there are 686 in the last four years, against 163 in the thirteen preceding years; while of clerical

enfranchisements the average during the last four years is nearly double that of the average of the thirteen preceding. This is a clear indication of a desire and readiness on the part of tenants to get rid of copyhold tenure, provided they can do so on reasonable and just terms.

Another table, contained in the same report of the commissioners, will furnish us with some information as to the mode of enfranchisement preferred. The acts provide three different methods of compensation to the lords; either a gross sum may be paid for enfranchisement, or the fines and other rights may be commuted for an annual rent-charge, or fines of fixed amount (where before arbitrary), or land, may be allotted to the lord in lieu of his rights. The following table shows the nature and amount of the considerations during the seventeen years from 1841 to 1857:—

Years.	No.	Payment in full.			Rent-charges.			Land.		
		£	s.	d.	£	s.	d.	A.	R.	P.
1841	...	1	...	8 14 0	...	—	...	...	—	—
1842	...	12	...	594 19 0	...	120 0 0	...	...	—	—
1843	...	29	...	4,815 7 2	...	17 0 0	...	...	—	—
1844	...	39	...	9,572 0 0	...	138 19 5	...	...	—	—
1845	...	56	...	10,651 3 4	...	763 5 6	...	...	—	—
1846	...	56	...	13,162 18 6	...	286 0 0	...	97	3	6
1847	...	52	...	12,158 14 8	...	474 15 0	...	...	—	—
1848	...	25	...	3,091 17 7	...	56 19 1	...	...	—	—
1849	...	30	...	3,929 6 10	...	144 7 6	...	...	—	—
1850	...	37	...	7,530 6 3	...	88 0 1	...	798	2	2
1851	...	64	...	22,723 4 8	...	273 13 0	...	...	—	—
1852	...	44	...	16,699 17 9	...	116 12 0	...	313	1	25
1853	...	58	...	15,299 19 9	...	157 15 9	...	...	—	—
1854	...	131	...	30,732 10 3	...	150 6 5	...	...	—	—
1855	...	220	...	44,874 14 8½	...	166 10 4½	...	13	1	15
1856	...	231	...	53,408 4 2½	...	7 18 11½	...	...	—	—
1857	...	303	...	55,879 17 6½	...	50 14 0	...	...	—	—

This shows us that commutations for rent-charges are growing less and less in favour, in comparison with enfranchisements for immediate payment; while compensations in land are quite exceptional.

The act of 1852 having thus proved a manifest success, it has been followed up by the act of the last session, of which one of

the first enactments sweeps away the whole of that elaborate machinery for wholesale enfranchisement, which had formed so ponderous a part of the original act, and which had proved so signally inefficient. An attempt is also made to expand a little the compulsory clause of the act of 1852, which has proved so efficacious; but from this expansion we agree with Mr. Rouse that not much is to be expected. The clause has been hedged round with a qualification, which will probably render proceedings under the act of 1852 preferable. We will give the reader the benefit of the new clause in full. It is number six of the new act:—

“Notwithstanding the first section of ‘the Copyhold Act 1852,’ it shall be lawful from and after the passing of this act, for any tenant or lord of any copyhold lands, to which the last admittance shall have taken place before the first of July 1853, or of any freehold or customary freehold lands, in respect of which the last heriot shall have become due or payable before the first of July 1853, to require and compel enfranchisement of the said lands in the manner herein, and in the said act mentioned: provided always, that no such tenant shall be entitled to require such enfranchisements until after payment or tender (in the case of copyhold lands) of such a fine, and of the value of such a heriot; and in the case of freehold and customary freehold lands, of the value of such a heriot as would become due or payable in the event of admittance or death subsequent to the first of July 1853; and also in the case both of copyhold and of freehold, or customary freehold lands, of two-thirds of such a sum as the steward would have been entitled to for fees in respect of such admittance or heriot.”

This section brings under the compulsory principle, copyholds to which the last admittance has taken place before, as well as after, the first of July 1853. But then, under the former act, any copyhold could be brought into the latter category by a conveyance made expressly for the purpose, upon which of course the usual fine was payable; and, as Mr. Rouse observes, it will probably still be less expensive in the end to do this, than to make the payments required by the new act; for, upon a fresh admission, a young life may be brought into tenancy, by

which the amount of compensation calculated upon the principles advocated by the writer will be materially reduced.

What, a simple soul may ask, is the meaning of these long-winded enactments? Why could not a legislature, having once made up its mind upon the expediency of promoting the enfranchisement of copyholds, have enacted simply to the effect, that from and after the passing of the act, either lord or tenant might require the co-operation of the other in the process of enfranchisement, compensation to the lord for his rights being calculated upon equitable principles, and properly secured? What has really been enacted has the following effect. Supposing a tenant to have been admitted on the last day of June, 1853, and to have paid to the lord the usual fine of two years' rent on the occasion, such a tenant cannot at this present day obtain enfranchisement, without going through the ceremony of paying the admission fine over again, although the time is still far distant when, in the ordinary course of events, such a fine would again become due to the lord. It is well known that a scientific actuary can calculate the real interest of the lord at any given moment. The act, by necessitating a fine out of its due order and season, in order to found the right to enfranchisement, gives a bonus to the lord, though not of course to the whole value of the fine paid, provided the interest of the lord, the moment after a fine has been paid, be fairly calculated. As we get further and further from the 1st day of July, 1853, lords and tenants will be gradually more upon a fair footing in regard to the enactment of 1852. The new act does little or nothing to further this.

The results of the last four years show how far copyholders have appreciated the value of the legislative aid which has been obtained for them; but probably the feeling in favour of enfranchisement is not nearly so strong in the bosoms of the great bulk of the copyhold tenants, as it is in those of a few enthusiastic legal reformers, who, in the face of frowning lords and infuriated stewards, have gradually pushed legislation upon this matter to its present point.

It is perhaps not to be wondered at that this should be the case. We believe that the interests of the lords have been almost systematically overrated. There is no doubt that country valuers

entertain the most erroneous and exaggerated notions of the nature of the lord's interest, and when called upon to calculate a problem of the kind, they go to work in the most haphazard manner. The commissioners themselves have put forth general statements of terms for enfranchisement, which have almost lent authority to these erroneous ideas. For instance, to say that from four to six years' value is roughly the compensation for enfranchisement, in a manor where fines are arbitrary on death or alienation, has a very misleading effect. Supposing an admittance to have taken place but a short time before the calculation is made, between two and three years' value would be the real present value of the lord's interest in future fines at that time. In consequence of the erroneous notions derived from old valuing books and venerable rules of thumb, and which the acts did nothing to dissipate, but rather involved in farther obscurity, valuations have no doubt been pretty systematically unduly in favour of the lords. Country valuers were horrified when told that, under certain circumstances, less than three years' value might be an adequate compensation for enfranchisement. Those who valued for lords were indignant, those who were in the interest of the tenants reflected that on the next occasion they might have to advocate the other side of the question. The commissioners, who no doubt have always understood well where the shoe pinched, have done what they could to arbitrate between parties, and have been zealous to assist tenants desirous of emancipation. Still the unwillingness to intrust their pecuniary interests to ignorant or prejudiced valuers, must operate greatly to deter tenants from demanding enfranchisement. We observe, in several of the later reports of the commissioners, that they have thought it necessary to interfere in more than one case, and to suspend proceedings in a proposed compulsory enfranchisement, by declining to confirm the award of the umpire, on the ground, as they say, that the amount awarded was excessive, having been calculated upon an erroneous principle.

There is another disadvantage under which the tenant lies. The act of 1852 enacts, that the person who requires enfranchisement shall bear all the expense of the same. This of course applies equally to lords and tenants; but, then, it is not the lord

who feels the inconvenience of the copyhold system, nor from whom the proposal of enfranchisement usually comes. A tenant, therefore, in calculating the advisability of requiring enfranchisement, has to look to the costs and expenses which may ultimately be thrown upon him; over which costs and expenses, however, it is satisfactory to know that the commissioners have a controlling power, and they must be certified by them as reasonable, and properly incurred. Still, practically, this question of expense operates prejudicially to enfranchisements. In the bill of the act of 1852, as sent from the Commons, power was given to the commissioners to determine who should pay the expenses in the absence of agreement between the parties; and, unless otherwise determined by the commissioners, the expenses were to be borne rateably by the lord and tenant, in proportion to the value of their respective interests in the lands to be enfranchised. This section was afterwards altered, and the whole expense thrown upon the party requiring enfranchisement (*Rouse*, p. 240, note). Mr. Rouse remarks that the latter provision appears more accordant with justice, as the enfranchisement is to be enforced either for the private interest of the party requiring it, or on public grounds. If the former, it is but fair that the party at whose desire the enfranchisement is made should bear the expense; and, if the latter, the public should bear the expense, instead of its being thrown on an individual who asks for no alteration in his rights, and who receives only the value of these rights, without allowance or deduction. There is, no doubt, force in this observation, and we are not disposed to dispute its justice very vehemently; still, the principle of compulsory enfranchisement having been once admitted as a measure of public utility, unless the *whole* expense be thrown upon the public, it is not very obvious why one of the two parties to the enfranchisement should bear more than his proportionate share of the expense. Upon this matter there may be differences of opinion; but the result, no doubt, is to stem the current of enfranchisement.

Yet, on the whole, the promoters of this measure may feel satisfied with the effect of the enactment of 1852; and, as the subject gradually becomes more familiar and better understood by the tenant mind, the progress of enfranchisement may be

expected to be still more rapid than it has yet been. The new act, as before observed, does little more than sweep away wholesale some of the useless enactments of the former acts; it contains some enactments of a practical character, such as experience had shown to be wanted.

Mr. Rouse's work contains so much of the Copyhold Acts as is now law, and such portions of other acts as relate to the subject. These are preceded by a very useful and practical treatise upon enfranchisement, which, the author observes, presents three points of view—firstly, the *legal*, or what may be effected; secondly, the *practical*, or how an enfranchisement can be effected; and thirdly, the *mathematical*, or the terms on which an enfranchisement ought to be effected; the last, he well observes, being the most important point of view, though but slightly, if at all, treated of by most of the writers on enfranchisement. Accordingly, Mr. Rouse dedicates a considerable portion of his treatise to this branch, to which he has devoted much attention, and which we propose to go into a little here. "The calculation of the value of copyhold enfranchisement," says Mr. Rouse, "appears at first sight extremely abstruse, from the various liabilities to which the tenant is subject, and seeming impossibility of fixing the value of different liabilities; particularly when it is considered that there is the quit-rent, that there are fines in some manors of a fixed amount, and in others dependent on the annual value of the property at the time of imposing the fine, and in some cases payable on death, and in others on death or alienation. That difficulty, and to a still greater extent, appears in the heriots, and the uncertainty becomes still greater when viewed with regard to timber, mines, &c. If all the rights be viewed at once, and an attempt made to fix a rule upon which enfranchisement shall be calculated, the difficulty will continue in all its force; but, by separating the liabilities, and considering each by itself, the difficulties will gradually disappear, and the value may be calculated with considerable ease, and on strictly mathematical principles.

"The various liabilities to which the copyhold tenant is or may be subject, and which are capable of appreciation, are divisible into fines, rents, reliefs, heriots, rights in timber, and rights in

mines. Of these, the first-mentioned—namely, the fines—are by far the most important in amount and value; and these again are divisible into four kinds—those payable on change of tenant, those payable on change of lord, those payable at fixed intervals, and those payable on licences to the tenant. The first and most general class is that payable on change of the tenant, and is most usually payable on death or alienation. In some few manors, however, as in Harrow, and others near London, a fine is only payable on the first admission of the tenant; and on his subsequent admission to other tenements, copyhold of the manor, he is not liable to payment of a fine; and, from the opportunity given to tenants in such cases to avoid payment of all large fines by first purchasing a small tenement, a different mode of computing the value of enfranchisement must be adopted than that ordinary case of fines on death or alienation.

“The second class is not very usual, but to a certain extent prevails in the north of England. When fines are so payable, a claim can only be made in respect of changes of the lord of the manor by death, and not by his own act.

“Lands subject to such fines are, however, in general held for the joint lives of the lord and tenant, and a fine becomes payable on extinction of either life. The lord is, therefore, a kind of nominee; but instead of being a nominee whose life increases the tenant’s right by deferring the payment of another fine until the death of both, it expedites the payment, by subjecting him to payment of a fine on death of either. The increased liability to which the tenant is subjected by this class of fine is easily calculated, as is explained in the rules after given.

“Fines are certain in the amount, certain as to the proportion with respect to annual value of the property (as, for example, one year’s value), or arbitrary, which latter fine has by several decisions been fixed at two years’ improved value, deducting quit-rents, but not land-tax. In calculating the value of enfranchisement from fines, two questions arise: 1st, the value of one fine; 2ndly, what number of fines, or fines and fraction of a fine, ought the lord to receive to discharge the land from his right to the fines in perpetuity?

“With respect to fines certain of a fixed amount, the first

question is easily answered ; but with respect to other fines, the amount can, of course, be only adjusted by mutual consent of the lord and tenant, or by valuation. . . . The question as to the number of fines and fraction of fines the lord should receive, is the one in which the great difficulty connected with copyhold enfranchisements has been experienced ; for though there appears much greater difficulty in estimating the value of other rights, as those in timber, mines, and minerals, yet in the great majority of instances, the only mutual right from which the lord derives benefit, is that to fines ; and, on the value of that interest being correctly settled, no obstacle would arise in the way of enfranchisements.

“ It fortunately happens that this is a question capable of mathematical solution, and that figures prove themselves ; so that, if each step of the calculation be not based in accuracy, it will be easy to point out its error, and to rectify it.”

So far Mr. Rouse as to the preliminary difficulties and data which the valuer in copyhold enfranchisement has to deal with. We will now give the method of calculation propounded :—“ In the first place, as to fines arbitrary, *payable on death or alienation*. In such cases, there are two contingencies on which fines are payable—the one *death*, the other *alienation*. Had the former only existed, the same principle of computation might be adopted as that in valuing successive presentations to an advowson ; that is, estimating the present value of first admission at death of the tenant, that of the next succeeding admission, and so on ; and when no tenant on the court rolls, adding the fine to be received forthwith. Of course, in making such a calculation, it would be requisite to assume some age as that at which the future tenants would be admitted, in order to fix a value on their lives.

“ The obtaining the value as to lives would not, however, give the value of enfranchisement, as the fines are also payable on alienation. The question then arises—How is the value of alienation fines, and of the effect which alienations have in changing the lives, to be calculated ?

“ The correct way to make such calculation, is to adopt the principle acted on in fixing life values, which must have formerly appeared almost as difficult to fix as alienation values ; and

another step enables the blending the two values, and finding what the combined value is.

"The true mode of estimating such combined value, is to find on each manor the average interval which has elapsed between changes of tenants, for such a period of time as will give a fair average, and then to calculate on such average, allowing for the difference in values depending on the ages of the tenants standing admitted."

Here we are disposed to take issue with Mr. Rouse as to the propriety of introducing the consideration of the ages of the tenants standing admitted. The average interval calculated in the way mentioned—that is, deduced from the statements of the court-rolls themselves during some considerable period—is based both upon the average length of human life, and the average frequency with which men sell their lands, but bound and mixed up together in a way incapable of analysis. The consideration of life-average having been already introduced, it does not appear to be just or accurate to import it again into the calculation. Only in certain extreme cases does there seem any propriety in this; as for instance when a tenant is admitted at such an age that his death will in all probability happen long before the average period at which, under ordinary circumstances, either by death or alienation, the tenancy would have passed from him. Such cases as these are, however, generally in practice provided for, by introducing young and healthy lives into the tenancy. Now, if we take such a case—namely, the admission of a young tenant, whose present expectancy of life far exceeds the interval at which, in the particular manor, the experience of years shows that tenancies usually change hands—it would be obviously unfair to the lord to consider the next fine as deferred until the probable expiration of the tenant's life; as, according to supposition, the more probable thing is, that he will part with the tenancy by some means or other before that time, which particular time can, for our purpose, be no other than the average time determined from experience, which embraces all causes of change of tenancy.

The sum to be paid for enfranchisement from fines is, of course, the present value of all future fines, which, though infinite in number, diminish so rapidly in present value that the

greater part of them are altogether inconsiderable and inappreciable; and the valuation of the first and next fine about to happen, is in truth the only thing about which valuers have any room to dispute. When the existing tenant is very old, it will be urged on the part of the lord, that the next fine will probably happen sooner than the average; when the tenant is very young, the opposite probability will be contended for on his part. But it seems to us that taking the case of no tenant on the rolls—that is, of a fine being immediately payable—the age of the tenant about to be admitted cannot fairly be taken into consideration in calculating the present value of all subsequent fines. The average interval resulting from all causes of change of tenancy is the only fair basis of calculation. If, however, there be a tenant on the rolls, the length of time which he has already held will evidently enter into the consideration of the probability of the next change, upon which depends the value of the next fine. Supposing a tenant to have already held beyond the average interval, there can be no unfairness in considering a fine to be due immediately.

Mr. Rouse lays down the following rule in the case of a tenant being on the rolls:—

“In such case, instead of the first fine being taken as payable forthwith, a due allowance must be made for the value of the life, and the first fine deemed payable at the end of a corresponding part of the manorial interval, between changes of tenant; the subsequent fines must also be taken as payable at the full manorial interval, from time to time, at which the first and other fines are respectively deemed payable.”

Probably the author here assumes the tenant to have been only just admitted on the rolls, and to have paid his fine, for in such case only would the above rule, according to our view, approach to any thing like fairness; but even in that case we contend that it would, on the whole, be equitable to consider the first fine as due at the end of the first manorial interval, without reference to the age of the tenant, which may just as well exceed as fall short of that interval. The rule, be it observed, does not contemplate at all the tenant's expectation of life exceeding the manorial average interval. We cannot follow the author into

all the details of the various cases, and must refer the reader to the book, which, notwithstanding the difference of views which we have expressed, we think calculated to be practically useful. For, after all, in matters of this kind, men will much more frequently cut the Gordian knot than weary themselves with nicely untwisting all its tangles; and, provided substantial equity be done in ordinary cases of enfranchisement, it is perhaps as much as can be expected.

Next to fines arbitrary, the most troublesome and important species of liability to which the copyhold tenant, and even some freeholders, are subject, is the heriot. How to calculate the proper compensation for the release of this barbarous exaction, is a difficulty. Mr. Rouse says:—

“The opinion of the Real Property Commission appeared to be, that a fixed sum should be charged for each heriot; but a fixed sum would in scarcely any instance give the true value. In many cases the lord would receive much less than the value of his interest; whilst, on the other hand, the amount would press very hardly on the owners of small property. From the great uncertainty in the amount of payment, there appears at first view great difficulty in framing any rule to do justice to the lord and also to the tenant; but, on a more attentive consideration of the subject, it appears that a rule may be framed so as to protect the interests of both parties. In the case of fines, where there is a still more accurate mode of computing value than that dependent on past payments, it would be injudicious to adopt the latter basis of computation; but in the case of heriots, which are not regulated in the same way, by the annual value of the land, it seems to be the best principle that can be adopted. The great objection to calculating on past payments, under any circumstances, is, that a premium is given to exaction, and a discouragement to liberality; and to a certain extent that objection is well founded. But in the case of heriots, it seems that the mode of computation from the past payments may be so modified as to be free, in a great measure, from the objection. It is submitted that the following mode of computing the value of enfranchisement from heriots will be just towards both parties:—

“In the first place, ascertain the average amount received by

the lord on the three last occasions on which heriots have been payable for each respective tenement.

"The average is taken on the three last occasions to allow for a change of lord, and thus in part guard against too great strictness or remissness on any particular occasion. As the amount received may have been gradually increasing or gradually decreasing, it is proposed, with a view to more closely approximating to the present average value, to add or deduct one-third of the difference between the amount of the last and second heriot, according as this last was an increasing or decreasing amount. The amount so obtained is to be deemed the value of one heriot.

"The following will more clearly explain the mode of computation :—Suppose the three last receipts for heriots were £15 for the earliest, £17 for the second, and £22 for the last ; these amounts added together will be £54, which, divided by 3, would give £18 for the average ; and the payments being of an increasing amount, one-third of the difference between the last and second heriot, being £2, is to be added, which will make the amount to be taken as one heriot £20. Or suppose, in the case of a cottage, the amounts had been £2, £3, and £4, the average would be £3 ; and to which adding one-third of the difference between the last and second heriot, the value of one heriot would be £3 : 6 : 8.

"Thus, having the value of one heriot, the calculation is to be made of the value of the heriots in perpetuity."

It will be evident that the plan of adding or subtracting one-third of the difference of the last two values is merely arbitrary ; but the matter is, in truth, not of much consequence. In calculating the enfranchisement from heriots as from fines, the real thing is to determine the proper manorial interval ; and, above all, when the first fine or heriot is to be considered as about to fall.

The heriot usually depends on the death of the tenant, in some cases on death or alienation ; and the rules applicable in the parallel case in fines must be used accordingly. The work before us contains a number of explicit rules, with examples, to the perusal of which we commend the reader. The desire of enfranchisement seems to be on the increase ; and it is to be hoped that the subject will obtain more and more attention from those

whose business it is to advise and assist in such matters—we mean valuers and agents, upon whom the parties interested are obliged to rely much ; but who, we fear, too often are very ill-fitted to give any sound advice. Under the control and guidance of the commission, it is to be hoped that the work will go on at an increased rate of rapidity, and with satisfaction to the parties interested on both sides, as it will undoubtedly be for the benefit of the state.

ART. VII.—*A History of England during the Reign of George the Third.* By WILLIAM MASSEY, M.P. Vols. I. and II. London : John W. Parker & Son.

NOTWITHSTANDING Mr. Carlyle's denunciation of the eighteenth century, it will scarcely be doubted by any one who is competent to form an opinion on the subject, that a knowledge of the history of England, during the reign of George III., is of the utmost importance with reference to the present political and social condition of this country. Lord Macaulay has justly observed, that the period embraced in Hallam's *Constitutional History*, extending from the reign of Henry VII. to the accession of George III., may be considered as forming a complete cycle ; and that, at the close of the reign of George II., the great religious and political contests which had agitated the sixteenth and seventeenth centuries had been brought to a close, and the nation had sunk into a state of quiescence. With the accession of George III. a new order of things began—a new cycle commenced its course. That cycle is now running on ; and though we cannot, therefore, judge fully of its real character, yet, after nearly a century of this period has been evolved, we may venture to form some notion, at least, of the influences to which it is subject, and of the tendencies which are most strongly in operation. Most of these will be found to have disclosed themselves at an early period in the reign of George III. ; and nothing can be more interesting than to trace the germs of those social and poli-

tical ideas which now predominate throughout society, gradually unfolding themselves, and to mark the manner in which truths now acknowledged and acted upon were at first received.

It is scarcely possible for any one who calmly considers the events and characteristics of our domestic history during the last hundred years, to mistake the paramount influences that have been at work. The spread of intelligence throughout the community, and the desire for greater political power on the part of the people at large, have given a new character to the period now in progress. These are the influences which at the present day principally affect the "body-politic;" and they are influences which are not likely to be greatly modified by any events or circumstances which the future may have in store. It is, perhaps, not too much to assert, that there is scarcely a single question connected with government and legislation, on which men in our day think as their predecessors at the middle of the last century thought. We have long since ceased to be satisfied with "political and religious liberty," as understood at the Revolution of 1688; nor do we now consider ministerial responsibility, and the right of the people to be taxed only by their representatives, as forming a sufficient guarantee for good government. Our feeling of respect for the wisdom of our ancestors, does not prevent us from adapting our institutions to the wants of the present day. The protection of particular interests is no longer regarded as a primary object of legislation. Even the common law, much as we owe to it, has ceased to be considered as the perfection of reason. Very different was the state of feeling, even among the intelligent portion of the community, when George III. ascended the throne; but during his reign the leaven was gradually working throughout the mass; and, towards its close, the immense progress that had been made became portentously visible.

But the change which took place in the views and feelings of the public during the reign of George III., was not confined to matters of government and legislation. Social customs and domestic habits, literature and art, even moral and religious sentiments, had undergone great alterations during that period. The vast increase of commerce and manufactures had produced important changes in the national mind. Notwithstanding the

lavish expenditure of the public treasure in war, the wealth of the country had enormously increased; and the great advancement of science, and its application to useful purposes, had opened up new resources, and developed new energies. In no period of equal length in the previous history of the world, had civilization made a more rapid and decided progress.

A history of the reign of George III., written with reference to the views which we have now attempted to indicate, has always appeared to us to be exceedingly desirable. We have hitherto had no history of the period which can be regarded as satisfactory, and adequate to the subject. Perhaps the period has only now arrived when such a work could be undertaken with any chance of success. The different correspondences which have been published, have at last, we venture to think, thrown all the light that is desirable on the political occurrences of the earlier portion of the reign. On the great transactions which then took place, and the different questions which arose, we can now form an opinion with the calmness and impartiality of a remote posterity. We can not only judge of the policy of the governing powers of that period by its fruits, but we have seen the effects of a policy precisely the reverse of that which then prevailed. Nor is it a small matter, that the greater portion of that period is now so remote, and the changes in our day have been so great, that the historian may proceed without danger of treading on the

— ignes

Suppositos cineri doloso.

Mr. Massey's work, judging from the two volumes which have now appeared, bids fair to supply the deficiency we have pointed out. The legal training of the author, and his parliamentary and official experience, qualify him admirably, in many respects, for the task he has undertaken. Every question on which parties differed is stated by him in a clear and intelligible manner; and his own opinions, whenever expressed, are conveyed in a moderate and conciliatory tone. Much skill, too, is shown by the author, both in the general design of the work and in the execution of particular narratives. The rules of historical *perspective* are carefully observed by him—each subject and incident standing out

in the proportions which it ought to bear as viewed from our own times, in a general survey of the period of which he treats. Mr. Massey, however, does not attempt the *picturesque*; and is not ambitious, in so far as style is concerned, to produce any other effect than that which arises from accurate statement and intelligible narration. His language, though forcible and well-chosen, is merely that of a writer who wishes to convey his ideas clearly to the mind of the reader.

But the work has higher merits than those of a mere artistic character: it is obviously the production of a man of a discriminating, impartial, and independent character of mind. Although disapproving, as may be supposed, of the policy of George III., Mr. Massey is by no means a blind and devoted worshipper of the Whigs as a body, or of any of the connections; and does not scruple to expose their grievous faults. Even the Rockinghams do not escape the censure of his severe and unbiassed judgment. He strongly condemns the manner in which the Opposition wasted, in internecine conflicts, the strength which should have been used with unbroken force against the ministry of Lord North. He censures with much severity the violent language employed by the leaders of the opposition, in their attacks on the government, during the American war. He endeavours to vindicate the policy of non-interference adopted by the government on the first partition of Poland. He expresses his dissent from the popular view of the trial of Admiral Keppel. Nor does he fail to do justice to the more democratic friends of liberty, and to the new spirit which had begun to show itself among the people. He both sees the causes, and is alive to the importance, of the great popular movement which began at an early period of the reign of George III., and which no repressive policy could check.

The part of Mr. Massey's work which, we think, is the least successful, is the chapter on the state of society in England at the accession of George III. The introductory part, tracing the progress of society from the middle ages to the eighteenth century, appears to us to be superfluous; and, in any view, is scarcely such as we should expect from a historian of the present day, acquainted with all that has been written on this subject during the last thirty years. Even his account of the state of manners

at the middle of the last century, although carefully compiled, does not furnish much new information to the generality of well-informed readers. After Lord Macaulay's admirable chapter on the state of England in 1685, an attempt of this nature is somewhat perilous for any writer who does not possess some special qualification for the task. We cannot but think, also, that Mr. Massey's chapter is rather out of place where it occurs, and that it might have been inserted more appropriately nearer the commencement of the work than at the beginning of the second volume.

The present volumes bring the history of the reign of George III. down to the year 1780 ; but during that period the policy of the king and his friends had been fully developed, and its disastrous influence on the national welfare made manifest. The results, so forcibly summed up by Lord Macaulay, had now taken place—"a nation convulsed by faction—a throne assailed by the fiercest invective—a House of Commons hated and despised by the nation—England set against Scotland—Britain set against America—a rival legislature sitting beyond the Atlantic—English blood shed by English bayonets—our armies capitulating—our conquests wrested from us—our enemies hastening to take vengeance for past humiliation—our flag scarcely able to maintain itself in our own seas."

How all this evil had come upon the nation, it is not difficult to discover, and ought never to be forgotten. From the accession of the House of Brunswick to the beginning of the reign of George III., the government of this country had been principally in the hands of the great Whig families, who had supported the principles of the revolution, and the provisions of the Act of Settlement, under trying and difficult circumstances. It was to their influence unquestionably that the first two sovereigns of the House of Brunswick were indebted for the maintenance of their throne. The ministers who had been supported by this powerful party—Walpole, Pelham, and Newcastle—had been able to carry on the government without respect to the wishes and views of the sovereign. Neither George I. nor George II., it is true, had any very strong opinions on questions of internal policy, and always shewed greater interest in the affairs of Hanover than in those of

England. As long as this weakness was humoured, they felt no desire to interfere with the policy of their ministers; but, even had it been otherwise, it is difficult to conceive how they could have struggled against the influence of the men to whom their security was owing.

The means by which the ministers, to whom the leading Whig families lent their support, practically administered the government of the country, are well known. Bribery reduced to a system—government influence unsparingly employed—patronage exercised with a view to political support—all the acts of corruption unceasingly applied, were the instruments by which successive ministers worked. How far the necessities of the case justified the recourse to such means, is a point of casuistry which we have no desire to discuss. But, before the end of the reign of George II., various symptoms showed that the system of government which had long prevailed was not likely to last for many years. Pitt had appealed to popular sympathies, and the power which he thus wielded in the country was so strong, that Newcastle was forced to enter into a coalition with him. Had George III. been a sovereign who understood the real interests of the country, and desired to forward them, it is not impossible that a great popular party might have been formed, which would have absorbed all that was best among the Whigs, and antedated by half a century the adoption of liberal government and progressive reform.

Such, however, was not the policy of George III. He was resolved indeed to put an end to the supremacy of the Whigs; but this was only that he might carry into effect, in the government of the country, the views which he had unfortunately been led to adopt under the influence of his mother and Lord Bute. The will of the sovereign was henceforth to be supreme in the state. His first idea seems to have been that this could be accomplished by pure means—by a vigorous use of the prerogative, and by appealing to the loyalty of the nation; but such an attempt he speedily found to be impossible with the generation of politicians with whom he had to deal, and with a parliament not responsible to the people. Nothing could be more natural, therefore, than that he should have recourse to the same arts by which the Whigs had established their power. All these

and others, then first introduced, were accordingly brought to bear for the purpose of effecting his object, and with so much success, that at last the will of a sovereign, of limited capacity and narrow views, was paramount in the councils of a great nation. At first, indeed, the attempt was one of considerable difficulty ; but, being determined to attain his object, he was enabled, through the means to which we have alluded, to continue for ten or twelve years, as Professor Smyth has expressed it, "a sort of running fight with the Whigs and their families, till the ministry of Lord North was found sufficiently stable and accommodating to serve all the purposes, and gratify all the wishes, of the patrons of the new system."

Mr. Massey is of opinion that the policy of the king was by no means so deeply laid, or his designs so admirably constructed, as has sometimes been supposed.

"There is no doubt," he says, "that he intrigued against the ministers he abhorred, and that he employed irresponsible agents to communicate with his loyal friends in parliament, as well as others who were disposed to his service from less honourable motives. But the deep-laid, complicated scheme of a double cabinet, as described by Burke, would have been unintelligible to the limited and practical understanding of George the Third. If he resorted to mystery and secret influence, it was not for the purpose of setting up a cabinet within a cabinet, but simply to disperse the haughty cabals which had enthralled his predecessors, and to recover what he thought fairly belonged to a king—the right, namely, of choosing his own servants, and being their master instead of a puppet in their hands. The double cabinet was a romance which sprang from the imagination of the great Whig orator ; and he pays far too great a compliment to the capacity of the king's 'friends,' when he attributes to them a design of such admirable order and consistency, as that which he presents in the 'Thoughts on the Causes of the Present Discontents.'

"Neither was the conduct of the Earl of Bute, the reputed author and manager of this abstruse policy, consistent with the part attributed to him. Instead of keeping in the background, and retaining the direction of that secret interior cabinet in which

alone real power was to reside, he put himself forward with intemperate haste as a candidate for that exposed and prominent post, which is the object of a statesman's legitimate ambition. He was sworn of the privy council the day after the king's accession. At the first opportunity he became secretary of state, and, a few months later, he assumed the name and office of first minister. All this time his language and conduct were those of a high Tory. So far from seeking to dissemble his master's views, he astonished and alarmed the Duke of Newcastle, by quoting the king's personal pleasure as a reason for every thing that was done, or ordered to be done. He named the court candidates at the general election, and rated the first lord of the admiralty for having presumed to dispose of the admiralty boroughs without the king's express directions. All this might be arrogant and unconstitutional, but nothing surely could be farther removed from subtle intrigue and clandestine management."—Vol. I., pp. 67-8.

But, whether deeply laid or not, the scheme was eminently successful—not only with regard to particular measures, but in virtually upsetting some of the most important principles of the constitution, and wholly changing the position in which a ministry in this country properly stands. In this respect no one was more blamable than Lord North. He had long seen that the struggle with the American colonies was utterly hopeless, and yet, out of deference to the wishes of the king, he was willing to continue a contest which involved the expenditure of so much blood and treasure, and which, when once admitted to be vain, was so clearly opposed to all the interests of the country. As Lord Brougham has justly observed—"What otherwise might have been regarded as an error of judgment, became an offence, only palliated by considering those kindly feelings of a personal kind which governed him; but which every statesman—indeed, every one who acts in any capacity as trustee for others—is imperatively called upon to disregard."

Lord Gower, on quitting office in 1779, had represented to Lord North, for the information of the king, the mischief of the policy which was then pursued with regard to the American colonies; and the latter, in announcing the resignation to the sovereign, declared that he had for the last three years been of the

same opinion as his late colleague. On this declaration Mr. Massey observes, with great force and justice—

“It is difficult to say whether such an avowal as this is more discreditable to the king or to his minister. The decent theory of the constitution, which supposes that the king can do no wrong, devolves the whole responsibility of the crown, both in theory and practice, upon the minister; and no sovereign, while availing himself of this immunity from censure, has a right to require that his public servants shall be mere agents to carry into execution the policy which he dictates. The predecessors of George the Third had been content to observe the limits assigned to them by the constitution; and no statesman since the Revolution had held office on the terms which Lord North and his colleagues appear to have considered consistent with what was due to the country and to themselves. Godolphin, Walpole, Pelham, were real ministers, not political agents of the sovereign. Even the querulousness of Grenville, the insolence of Bedford, and the waywardness of Chatham, which vexed the earlier years of George the Third, were far preferable to the opposite extreme, of absolute deference to the royal will and pleasure. The Whigs had too rigorously enforced the doctrine of ministerial responsibility, which does not necessarily exclude the sovereign from all participation in the counsels of his advisers; but the successors of the Whig statesmen practically surrendered the great doctrine of the Revolution, when they consented to carry measures which were not only dictated by the crown, but which they believed to be detrimental to the public interest. That such conduct was a breach of trust, and a violation of plain constitutional law, there can be no question. The doctrine of the king's friends transcended that which conduced to the destruction of the old monarchy. The Churchmen and Tories of the Stuart dynasty were content with inculcating passive obedience to a sovereign who, according to their idea, derived his authority from a higher source than the will of the people. The sycophants of George the Third could prefer no such claim on behalf of their master: he had no other than a parliamentary title; and the body by which it was conferred derived its authority immediately from the people. The tenet of the old monarchists was explicit and intelligible; but the

friends of George the Third dared not avow their doctrine, and could only bring it into use through surreptitious and shameful means. To make the king's will absolute, it was necessary that parliament should be debauched, and the responsible ministers of the crown discredited. And men of rank and character, scholars and gentlemen, were persuaded, against their will and against their convictions, to become the agents of a system from which it would have seemed that even the most profligate and needy adventurer should have shrunk."—Vol. II. pp. 440-2.

The policy of the court was successful in breaking the power of the Whig families; but, in the mean time, a new element had shown itself in the state, destined to increase in spite of the opposition of the crown and the aristocracy. The people had been awakened, and then had begun that great struggle which is still far from being ended, but in which so much has already been achieved in furtherance of the cause of liberty and good government. In describing the state of public feeling in 1768, Mr. Massey says—

"A third party at this time began to rise, equally hostile to both the cabals which distracted the state, and more powerful than either. The people had happily begun to find out that they had an interest in these matters, and that they possessed the ability, if they chose to exert it, to save the institutions, which had been intended for better things, from becoming a prey to the wrangles and intrigues of courts and factions. It was not the least of the splendid services which consecrate the name of Pitt, that he resigned the government of the country, when he 'could no longer administer it upon a full and entire responsibility to the people, by whom it had been committed to his charge.' Those memorable words, which sounded strange and uncouth in the ears of courtiers and privy councillors, sunk deep into the heart of the nation. If it was true that this incomparable statesman had been called to power by the public voice, then had the country been saved through the interposition of the people; and, though they might not always find a Pitt to whom they could abandon their entire confidence and affection, it was much that they had been taught to rely upon themselves, and to assert their right of independent action.

"Popularity is a word of wide import : on the one hand, there is nothing more noble and affecting than the spontaneous effusion of public gratitude and esteem for a benefactor of his country ; on the other, there is hardly any thing more painful to witness than the same meed of approbation lavished upon a vile impostor. It is this unhappy want of discrimination, which the people too often manifest in bestowing their favour, that causes real merit to turn aside with indifference, if not disgust, from popular applause. The popularity of Pitt, solicited only by public virtue and great deeds, was an example of the better kind ; that of Wilkes must always be quoted by those who would represent the favour of the multitude as despicable and degrading. But the people, though often lamentably mistaken, have this advantage over courts and parliaments, that they are always sincere in their manifestations, whether of hatred or affection ; and the rise and influence of a popular minion is commonly but the malignant sign of some distemper in the state."—(Vol. I. pp. 342-3.)

The whole conduct of the government with regard to Wilkes was of the most imprudent and foolish character. It was perfectly obvious from the first, that he was a man who desired nothing so much as to be persecuted into fame and popularity. His wish was fully accomplished, and he had the satisfaction of seeing the government put themselves clearly in the wrong. His imprisonment, and the seizure of his papers, at once placed him in the position which he was ambitious to attain. But the crowning act of folly in the matter of Wilkes, was the conduct of the government with respect to the Middlesex election. The decision of the House of Commons, declaring Colonel Luttrell duly elected, was no doubt dictated by the king—it was obviously an arrow from the quiver of George III. It excited a general feeling of indignation throughout the country, and strengthened the discontent which was now growing. In London, a riot of a serious character took place ; and it was stated by Lord Barrington, one of the ministry, in his place in parliament, that there was either actual or impending riot in every part of the country ; and that, from the tinnerns of Cornwall to the colliers of Newcastle, the spirit of insubordination prevailed.

On the attempt to tax the American colonies, and the disastrous war to which it led, there can scarcely, we presume, be a difference of opinion amongst intelligent men at the present day. The persistency of the king in a policy which was so obviously fraught with peril, is one of the most singular instances of infatuation, on the part of a government, which history has to record. Abundant warning of what might be expected from such a course had been given in the effects produced by Grenville's Stamp Act. But after the repeal of that Act had been carried by the Rockingham ministry, and when there was a fair prospect of retaining the colonies by conciliatory measures, the former policy was renewed as soon as the king found a ministry sufficiently subservient to his views. Even after the ultimate result was as certain as if it happened, he still stuck to his point. Not even on the Catholic question was the resolution of his majesty so fixed and determined as that which he had formed to retain America in subjection, and nothing but overpowering necessity induced him to yield at last.

But though the largest portion of the blame for the fatal policy pursued, not only with regard to the American colonies, but in many other respects, is justly due to the king, much of it must also be laid on the politicians of the period. We greatly admire the following passage, in which Mr. Massey deals out even-handed justice on the public men who figured during the earlier part of his majesty's reign.

"George the Third, when he began to reign, had little or no knowledge of either books or men. With the latter he necessarily became acquainted afterwards; but, unfortunately, kings look upon the least amiable side of human nature. This king was not, indeed, doomed to experience the extreme of sordid treachery, which some of his predecessors had proved; but, though none of his confidential servants were in secret correspondence with a pretender to his crown, he found, at least in the earlier years of his reign, a dull uniformity of selfishness among politicians, more depressing to a spirit of any generous instincts than occasional, or even frequent, instances of rapacity, or bad faith. Whether they professed to be his friends, or to be independent of his pleasure, the public men of the day, for the most part,

preferred personal objects to every other consideration ; and, which would be intolerable to men of nice and jealous honour, were even ready to claim and accept the favours of the crown under any circumstances, and without any sense of obligation. Even Pitt himself, while he proudly declined the perquisites of office, did not consider it beneath him to ask for a peerage and a pension, when he could no longer retain his post as a minister of state. Nor can men of exalted rank—the great chiefs of party—be fairly quoted as exceptions to this rule. Wanting nothing for themselves, they were, nevertheless, exorbitant in their demands on behalf of their friends and followers. Thus, then, it was with all. Whether they were nobles of the land, as the Bedfords and the Buckinghams, or professional statesmen, as the Foxes and the Grenvilles, or spies and runners of the court, as the Jenkinsons and the Dysons—all were alike ; peerages, ribbons, pensions, places, were the cry of all, from the highest to the lowest.”—Vol. I. pp. 61-2.

Even amongst the best men of the period, the violence of party-spirit impaired all their higher qualities. Speaking of the manner in which the administration of Lord North was nightly attacked in the House of Commons, in language the most gross and extravagant, Mr. Massey says—

“ Charles Fox, who entered on public life as the follower, and who subsequently became the colleague of Lord North, took the lead in this disgraceful warfare. Not on one or two occasions only, but continuously, night after night, for a series of years, the rising hope and head of the Whig party denounced his former chief and future ally as the greatest criminal in the country, called for his blood, spoke of him as a villain with whom it would be unsafe to be alone ; and, up to the eve of the coalition, desired to be branded as infamous if he ever formed a political connection with that minister. Barrè, who had passed from the practice of gross insult to equally gross adulation of Pitt, was also conspicuous in parliamentary defamation. But amidst numerous slanderers, whom to name would only be to redeem from the obscurity into which they have sunk, it is painful to record that Burke was among the foremost in this ignoble strife. The years, the philosophy, the decorum, which governed his private life,

could not restrain this great man from plunging into the excess of party violence, and from using weapons which the most impetuous and profligate of his coadjutors forbore to touch. It was not enough for Burke to assail, in unmeasured terms, the public character and policy of the minister, but he must hold up the bodily defects and infirmities of the man, not, indeed, to the ridicule—for, with all its faults, the prevailing temper of the assembly has been that of gentlemen—but to the disgust of the House of Commons.”—Vol. II. pp. 218-19.

An enlightened public opinion might have done something to restrain the folly of the king, and to correct the errors and excesses of politicians. But such can scarcely be said to have existed. The demonstrations of popular feeling which took place were not systematically directed against the evils which prevailed. The press was distinguished by scurrility, rather than by fair and sound criticism of public men and measures. The spirit of liberty which had been worked, had not assumed the watchful and scrutinizing character which it was afterwards to attain. Nor was that spirit, as yet, marked by much intelligence, or by the absence of narrow prejudices. The conduct of the government with regard to the American colonies was, at least until the pressure of the war began to be felt, in accordance with popular views. How little the principles of free-trade were generally acknowledged may be understood from the manner in which the proposal to remove some of the restrictions that fettered Irish commerce was received by the mercantile community. On the Catholic question the king was certainly not as yet behind the age. Many of the most eminent of the Whig politicians were opposed to any reform of the representative system; and there was certainly no clear perception throughout the community that *there* lay the main remedy for the worst evils that afflicted the nation.

Among the interesting subjects which will occupy the sequel of Mr. Massey's work, none will be more important than the progress of public opinion, and its effects on the government of this country. We know no one better qualified to treat this topic in a calm and impartial manner. We are happy to see it announced

that the concluding volumes are in preparation, and will shortly appear. We suppose that we ought to congratulate Mr. Massey that his loss of office has enabled him to proceed with a work which, if completed as it has been begun, will form a valuable addition to our historical literature.

ART VIII.—THE SLAVE TRADE
IN ITS RELATION TO MODERN TREATIES.
THE CHARLES ET GEORGES.

IF we were to judge of the certain accomplishment of some great result, from the elaborateness and apparent efficacy of the machinery prepared for its accomplishment, we should deem the slave trade to have been abolished very many years ago, so numerous and so stringent have been the treaties, conventions, and legislative enactments that were entered into and framed with the humane object of its extinction. In Mr. Herlslett's valuable collection of treaties (anno 1820—24), those which Great Britain entered into with foreign states for that truly Christian purpose, constitute a very large proportion; and, as respects the honest and unceasing energy with which the British Parliament prosecuted its share of the illustrious task, we need only refer to the statutes for carrying those treaties into effect, which were collected by Messrs. Godson and Petersdorf, anno 1846. All Europe—many, if not all of the South American republics, and a large host of the native chiefs of Africa—gave a noble reception to the invitation addressed to them from this kingdom; and the invocation, which spoke to Heaven on behalf of outraged humanity from the borders of the Thames, found an emulous response of mercy on the shores of Texas.

There was one nation, in particular, from whom we sought and procured a cordial co-operation. France pledged herself, at the congress of Verona, to the policy which the sovereigns of Europe were prompt to inaugurate, when peace admitted of their concerting a scheme for the suppression of the traffic in slaves. In entering upon this international mission, the European powers

did no more than those are bound to do, who know that justice, sooner or later, exacts appropriate atonement ; because none of them had entirely escaped the contamination and sin of this inhuman commerce. But, whatever the form of her government, or the chequered phases of her political and social condition, France was true in the proclaimed sympathies of her rulers and statesmen, and in the unfaltering tenacity of her legislation to the engagements by which she bound herself to put down the slave trade. We may refer to the successive conventions which she entered into with ourselves, as exhibiting the alacrity with which she aided us in our common design. From 1822 up to the present time, the traces of her aversion to the trade in slaves are brilliantly discernible in her statutes and ordinances. It was, however, by signing the convention of 1845, that she took the most decided step towards abolishing the African slave trade. That convention bound her to see that her national flag should not be usurped by the traders in human flesh. She engaged to keep a fleet of twenty-six armed cruisers in those waters, where the occurrence of that abuse might be reasonably apprehended. Her pledge to co-operate with us in our endeavours to repress the slave trade, was earnestly and, we believe, sincerely repeated in that convention, nor could a doubt be entertained of the fidelity with which technically, and in spirit, she adhered to, and enforced her engagements, until the recent *denouement* in the affair of the *Charles et Georges*.

There are, as a matter of course, two official versions of that affair—one on the part and in justification of the course adopted by the Portuguese authorities—the other defending the proceedings taken by the Emperor of the French. According to the former it would appear that, on the 29th of November, 1857, the commanders of the naval station of Mozambique captured the French barque “Charles et Georges,” because it was found anchored near the island of Quintangonia, in the bay of Conducia, a port interdicted to foreign commerce ; and for having on board one hundred and ten negroes, who declared that they had been forcibly shipped, independently of the vessel having on board effects which, according to the list attached to the decree of the 10th of December, 1836, are considered indicative of the illicit

traffic of slaves. The crown lawyer or advocate at Mozambique, having, on the 26th of December, 1857, made his accusation in compliance with the provisions of the said decree, against the captain and crew, for the infraction of the fiscal laws and the purchase of slaves, and all legal formalities having been complied with, sentence was issued on the 8th of March, 1858, condemning the captain in two years of hard labour, with a fine of 200 *milreis* (£100), and condemning the vessel and specie, but absolving the crew. The crown advocate and the captain both appealed to the Court of Relacao (cassation) at Lisbon against the said sentence. The French government, not recognizing the right of capture, and the legality of the judgments of the Portuguese tribunals, under the plea that the vessel was authorized to contract for labourers, and had on board a delegate appointed by the governor of the island of Réunion, demanded the delivery of the vessel and release of the captain. The Portuguese government did not consider that it could with propriety interfere in a matter which was before the tribunals, whose independence it could not touch without violating the fundamental law of the state ; and the French government pressed its claims, especially in a note from its minister at the court of Lisbon, to which the Portuguese minister for foreign affairs replied on the 18th of the same month, transmitting the documents explanatory of the affair, together with despatches to the Portuguese minister at Paris, to propose to the imperial government the decision of the pending question by the mediation of a third power, to be chosen by the Emperor of the French, according to the principles set forth in protocol number twenty-three of the Paris Conferences, on the 14th of April, 1856. This proposal was immediately rejected, and, by despatch of the 13th October, Count Walewski, minister of foreign affairs for the French empire, directed the Marquis de Lisle de Siry, minister of France at the court of Lisbon, to inform the Portuguese government, that the government of France would accept an arrangement upon the following basis—"Delivery of the captured vessel ; release of the captain twenty-four hours after the departure of the French ships of war from the Tagus ; mediation of the king of Holland to fix the indemnity to the parties interested, France repelling all idea of mediation on the

question of right." Count Walewski added that, upon the non-acceptance of this basis, the minister of France should carry out the instructions he had received. These instructions would, according to the verbal explanations given by that minister to the president of the council (Marquis de Loulé), as a last resource, result in his excellency's retiring with all the diplomatic and consular corps in Portugal, thus interrupting diplomatic and official relations between the two countries, and leaving to Admiral Lavaud, commander of the French naval forces in the Tagus, the termination of the pending question. Under those circumstances the Portuguese government, persisting in the conviction of its right, but seeing at the same time the impossibility of making that right prevail, deemed it its duty to cede to the peremptory exactions of France, by directing the release of Captain Rouxel, and the delivery of the captured vessel, to whomever the French government might designate. As regarded the mediation, the Portuguese government, considering that it had not been accepted by France on the question of right—the only one affecting the honour and dignity of Portugal—would not accept it upon the pecuniary question, and therefore left France to proceed in that respect as it might judge convenient, declaring that it would yield to whatever resolution France might adopt, for the same reasons which had obliged it to submit to the other exactions. In this spirit a note was addressed by the Marquis Loulé to the French ambassador at the court of Lisbon. All the Lisbon journals unite in describing the proceedings of the French as a gross act of violence, and in affirming that the blow was more immediately aimed at England.

We now come to the French view of the proceedings as presented by the authoritative organ of the imperial government, the *Moniteur*. After announcing the termination of the difference which had arisen between France and Portugal, relative to the vessel *Charles et Georges*, that journal observes—"The government of the emperor had demanded the liberation of the captain, the restitution of the vessel, and an indemnity for the loss incurred by the owners. Those demands have obtained a full satisfaction. The government of his majesty did not make them until it had acquired, by a reiterated examination of the matter, the full con-

viction of its right. The first objection is, according to the captain's statement, and according to the investigation set on foot by the minister of marine, that the vessel was seized beyond the territorial sea-line—that is to say, beyond Portuguese jurisdiction—consequently the Mozambique authorities had no right to interfere. But even admitting, as the Portuguese officer asserts, that the seizure took place in the Portuguese waters, the conduct of the Portuguese authorities is not the less unjustifiable. To prove this it will suffice to observe that the governor-general, and the commission appointed to decide upon the capture of the *Charles et Georges*, took no account of the regularity of its papers, which established the proper armament, nor of the presence on board of a delegate (*délégué*) of the French government, nor finally of any other circumstance, which ought to have left no doubt of the fair character of the ship (*la légitimité de sa mission*), and the honesty of the captain. It is the more astonishing that the Portuguese authorities should have considered as coming under the slave-trade laws, an act clearly defined and regulated by French legislation, as on the 19th of November, 1857, only a few days before the seizure of the *Charles et Georges*, the governor-general had addressed a circular to the district governors, the precise object of which was to regulate their conduct as regards French vessels that might touch at Portuguese ports to recruit labourers. Now, those instructions are to the effect that the Portuguese authorities must not mistake such vessels as slavers. After pointing out that those recruiting ships (*navires recruteurs*) have often on board objects considered by the Portuguese decree of 1836 as an indication of the traffic in slaves, the circular adds, that serious embarrassment might result from a rash application of the terms of that decree to vessels coming under the definitions of French law. The governor-general, therefore, recommended great circumspection as regarded French vessels, prescribing, in case they should touch at a Portuguese port, to limit the notification to the order which prohibits the engagement and embarkation of colonists, and to the exaction from the captain of a written promise to comply with such order. The measures to be adopted towards the *Charles et Georges* were, therefore, clearly indicated by the Portuguese authorities themselves; and it is in-

conceivable how they could have acted in a manner so contrary to their duty. The *Charles et Georges* was taken to Lisbon to be tried at a higher court of appeal. The government of the emperor which, from the very first, neglected nothing to enlighten that of his most faithful majesty on the true character of this affair, hoped that the cabinet of Lisbon, after taking cognizance of all the circumstances of the capture, and of the trial at Mozambique, would eagerly have admitted the irregularity of the proceedings of the governor-general of that colony, towards a vessel which could not even be suspected of being connected with the slave trade. That hope was in the first instance disappointed; but the Portuguese government, after a more careful examination, was brought to a more exact appreciation, and submitted to the just representations of the government of the emperor."

We have thus stated, from the columns of their own accredited organs, the respective conduct and views of the French and Portuguese governments. It has been observed, however, that the Lisbon press, and indeed a very influential portion of the London press also, have complained of the non-interference of England, when she was bound to protect her ancient ally against French aggression and outrage. The reasons for such non-interference are thus explained by one of the organs of Lord Derby's government. The *Morning Herald* says—"We have reason to know that no application was made by Portugal to our government for protection. Portugal, to her credit, adopted the only mode of action which was worthy of an independent and civilized state. When the discussion with France assumed an angry complexion, the Portuguese government, mindful of the value of the protocol of 14th April, 1856, applied to the British government for their good offices with France, and the request was immediately met in a spirit friendly to both nations, and in unison with that which inspired Lord Clarendon's beneficent proposition. The British government pressed upon France the wisdom and justice of mediation; but we regret to say that the French ministers declined to adopt that course, on the plea that it was a point of honour which could not admit of the interference of a third party! It was open to the British minister to follow another course—namely, to send the channel fleet to Lisbon, and to declare that

Portugal should not be compelled to restore the French vessel whether its detention were right or wrong, and then, if the Donauworth and Austerlitz made any resistance, to reduce them to match-wood. We cannot say whether the *Times* newspaper would have approved of such spirited conduct ; but this we know, that the Portuguese authorities would have prayed to all their saints to preserve them from their friends—that our parliament would have been now sitting to consider the estimates for a war with France, and whether the peaceful Bright would not suit this sober-minded nation as a foreign minister better than the pugnacious Malmesbury. We have never concealed our opinion of the moral and political tendencies of the system introduced by France for negro emigration. Lord Malmesbury, and his predecessor at the Foreign Office, have denounced it both diplomatically and in parliament, until they have run the risk of serious differences with the French government. The various organs of the press have all pointed out the dangers to which peace is exposed, by what is, in fact, a slave trade in a masked and somewhat modified form ; but the public themselves are not cognizant of all the difficulties of the question. The *Times* (in a leading article on this subject) says—‘ We had always thought that a slaver was like a pirate—fair prize wherever she could be caught.’ It is just the reverse. By the laws of man—that is, by international law—the *slave trade* is a *legal trade* ; and no ship of one nation has a right to touch a vessel of another nation, were she an avowed slaver full of negroes, unless a treaty existed between them, giving a mutual right of search. This is at the bottom of the whole case. The French government declares that they have no treaty with us or Portugal, which allows our cruisers to stop vessels under the French flag. They say they will carry out their own police. Upon this state of things they institute the ‘emigration for free negroes,’ and place a delegate on board their emigration ships. This mode of proceeding places them within the pale of government vessels, like men of war ; and the presence of the delegate forbids the officer from the cruiser who boards them from adopting any active measures, which he might otherwise do (although at his own risk) if the prize were a private vessel. The delegate

identifies the French vessel and its acts, whether for good or for evil, with the French government. Thus it would appear that, in the case of the *Charles et Georges*, the Portuguese cruiser, on finding the French delegate on her deck, should have reported her proceedings to her government, whose duty it would have been to remonstrate by diplomatic means. They could not confiscate a ship belonging to another nation in a summary manner. Morally speaking, we cannot defend the acts of the French emigrant ship, though we think that France may have the law on her side; politically, we repeat that a greater error could not be committed, than for her to be the first to refuse to adhere to the principles laid down in the protocol, which was almost the only item in the convention of Paris of which she and her coadjutors in that work might well be proud."

We concur in every word of the foregoing; and though we cannot arrive at any other conclusion than that the *Charles et Georges*, at the time of her capture, was practically and morally a slaver, we are bound legally and technically to contemplate her in no other light than as one of the mercantile marine of France, belonging to resident owners of that country, and notwithstanding the equipments which she presented, indicative of the character of a slave-trader, protected by the presence of a delegate, appointed by the governor-general of the island of Réunion. The act of the *Charles et Georges* was done under the sanction of the French government and law, and being so done was not cognizable by the tribunal at Mozambique (see *Maisonnaires et alii v. Keating*, 2 Gallison's Am. Reports, 334); and as respects the liability of the *Charles et Georges* to capture on the ground of piracy, she could not be liable on that ground, there being no law in force in France corresponding with the 5th Geo. IV., c. 113, which makes the dealing in slaves by British vessels on the high seas an act of piracy. The principles laid down by Sir William Scott, in his luminous judgment in the case of *Le Louis, Forest*, 2 Dodson, 246, though no longer applicable so far as British ships are concerned, continue to apply to such a case as that of the *Charles et Georges*. "A vessel," says he, "is not a pirate for want of a national character legally obtained." *A fortiori*, we say that a vessel cannot be treated as a pirate when she carries the papers which esta-

blish the fact of her duly-registered nationality. We may repeat, in the case of the *Charles et Georges*, what Sir W. Scott said of the *Le Louis, Forest*:—"This is not the property of sea-rovers, but of French acknowledged domiciled subjects. She has a French pass, a French register, and all proper documents, and is an acknowledged portion of the mercantile marine of that kingdom. If, therefore, the character of a pirate is to be impressed upon her, it must be only on the ground of her occupation as a slave-trader. Such an occupation cannot be considered legal piracy: it wants the distinguishing features of that offence: it is not the act of freebooters—enemies of the human race, renouncing every country, and ravaging every country in its coasts and vessels indiscriminately, and thereby causing universal terror and alarm; but of persons confining their transactions (reprehensible as they may be) to particular countries, without exciting the slightest apprehension in others. It is not the act of persons insulting and assaulting coasts and vessels against the will of their governments and the course of their laws, but of persons resorting thither to carry on a traffic not only recognized but invited by those barbarous communities. It is said to be a crime, and that it is the right and duty of every nation, and of every individual, to repress the commission of such a crime. * * Personal slavery, arising out of forcible captivity, is coeval with the earliest periods of the history of mankind: its existence is traced to the earliest and most authentic records of the human race—recognized by the codes of the most polished nations of antiquity. Even under the light of Christianity, the possession of persons so acquired has been in every civilized country invested with the character of property, and secured as such by all the protections of the law."

To be technically right and morally wrong, appears to have been the attitude of the Emperor of the French throughout this disagreeable transaction. Assuming the Portuguese authorities in fault, by not forbearing further proceedings when assured of the national character of the *Charles et Georges*, and the French government to have international law on their side in demanding her release, we cannot assent to the opinion, that the case was one to which the principle of international arbitration, agreed upon at the conferences at Paris, could not be aptly applied.

The French minister was one of the most earnest advocates of the adoption of that principle; and no sooner does the opportunity arise of testing its utility, than it is sternly and haughtily repudiated by its most zealous champion. If such a question be not one for reference to arbitration in its entirety, the protocol agreed upon at the conferences of Paris is a barren compact, inasmuch as each of the powers is left to be the arbiter of the points which may be amicably settled or determined, by the more summary means resorted to in this instance by France.

One beneficial result has flowed from the capture of the *Charles et Georges*. The gaze of Europe has been fixed on the scheme which the government of France has put into operation, with the object of recruiting free African labourers for the supply of her tropical colonies. The Emperor himself has been constrained to subject the experiment to the ordeal of a commission; and if the manacled negro on board the *Charles et Georges* be a specimen of the free emigrant whom it is the practice to deport to the French colonies, we cannot hear with surprise that the system has been already condemned. The principle of hiring free emigrants for deportation to dependencies where the labour market is inadequately supplied, has been long recognized and acted upon by ourselves, as evidenced by the success of our Emigration Commission. But ours is an emigration of spontaneity: our flag floats protectively over the head of the emigrant: he disembarks not from the infamous baracoon, nor with a fetter to coerce the freedom of his movements: his liberty is guaranteed by the most beneficent enactments—his health consulted by the most stringent medical and dietary regulations.

Until France assimilates her so-called free immigration to ours, it will be a mockery to call it any thing else than the slave-trade, not in disguise, but carried on in its most atrocious and unmitigated horrors.

ART. IX.—*Pénalité—Jurisdictions—Procédure—suivant la Science rationnelle, la Législation positive, et la Jurisprudence; avec les Données de nos Statistiques Criminelles.*
 Par M. ORTOLAN, Professeur à la Faculté de Droit de Paris.
 1 Vol. Paris.

PERHAPS the best idea might be given of this very valuable contribution to legal literature, by quoting the words wherewith the author himself concludes his work. In what he terms his Epilogue, he addresses the public as follows:—

“It is with deep satisfaction that I come to the close of this task, to which I have consecrated nineteen years of professorship, and more than ten years of uninterrupted study. So far as composition is concerned, as age advances one grows severe and exacting in regard to what one writes. Indeed, I hardly venture to say how many parts of this work I have repeatedly altered and transformed; nevertheless, my fundamental ideas never underwent any change, though I was seeking for them more precision of form. Penal law has the great evil inherent in it, that it excites to declamation. Heaven knows if this evil has been sufficiently felt! therefore, my desire has been throughout to be as concise and as sober in language as possible. But penal law has another disadvantage, that it ranks precisely amongst those portions of general information which, in this country, every one fancies he possesses by some inexplicable process of intuition. Nearly every man in France discourses upon the most abstruse problems of penal law without ever having studied them; and hence the extraordinary contradictions, the insensate notions, into which people fall. I have wished to bring into their proper rank and order all the various elements of our penal law, and make it accessible to the public like other sciences. Truth has, *per se*, such a character of simplicity, as well as of power, that, once found, all recognize it. I have felt that my duty was to find it.”

M. Ortolan defines his book most correctly. It is the coordination (if we may be allowed the expression) of all the

elements of French criminal law, which have been too often ill-appreciated by the public, and not by the *lay* public only, but frequently by the professional one also. M. Ortolan's work is neither more nor less than a kind of explanation of the criminal code, in which he appeals rather to the reasoning faculties than to the memory. We say an "explanation," instead of saying a "justification" of the code; for M. Ortolan is a too intelligent judicial philosopher not to see clearly upon how many points reform is called for, and not to allow his readers to perceive his impressions. His book is one that was utterly wanting in the judicial literature of France; and the marked favour with which it has been received is, consequently, easily to be accounted for. It is plain and practical, at the same time that it is philosophical—two conditions indispensable in a work of its character; the two former qualities are requirements of the subject, the latter is a requirement of the age.

As M. Ortolan's book contains 900 pages of very close print, and as our limits will not allow of our giving one page of analysis to every fifty of his, perhaps the fairest and most conscientious way of giving the reader an insight into what is both the "matter and the manner" of the book under our notice, will be to state summarily its construction, to note the subjects treated, the mode of their treatment, and their order of succession.

The so-called "Introduction," occupying sixty-eight pages, is divided into two principal parts; the first containing three chapters only; the other, seven minor subdivisions. The first sections treat of the abstract notions of penal provisions in general, and of the "auxiliary sciences" required for the study of the law; the last recur to the primary sources of French law—the Roman law, the Canon law, the laws known by the name of "*Droit barbare*," and the Feudal laws. From the Feudal laws we pass to the *Droit Coutumier*, which anciently held so large a place in French legislation; which should occupy so large a one in every well-governed country; and which it is one of the great misfortunes of France to have so considerably set aside. Upon this follow naturally the laws immediately emanating from the throne, and entitled the Laws of Royal Ordinance (*Ordonnances Royales*), which bring us at once to the laws and prescriptions of

the revolutionary era, and of what has followed it. The whole of this constitutes the "Introduction;" and is inspired by that precept of Vico's, that "nothing can be well known, the generation whereof is unknown."

After the "Introduction," we have before us the technical details of the work, which are thus distributed:—Three "books" of very unequal length (the first being the longest) treat successively of "Penal Laws properly so called, or Punishment;" of "Criminal Jurisdictions," and of "Penal Procedure." The first book is again subdivided into various sections treating of the following points:—"The fundamental theory of all Penal Laws;" their "general sense;" of the "active agent of crime;" of "crime in itself;" of "plurality of crimes, or their commission by a plurality of agents;" of the "definition of penalty." The second book is entirely taken up with the question of Judicial Organization, as also with the several degrees and causes of competency or incompetency of tribunals. The third book—which some legal readers may well wish longer—treats of Penal Procedure (including the so-called instruction), or "preparatory trial;" the public trial itself; the legal possibility of escape from penal decisions, and of the execution of penal sentences.

For the merely technical reader—for him who simply desires to master the minutest details of the mode in which a criminal case is gone through in France—the second book has perhaps as strong an interest as any other portion of M. Ortolan's work; but for those who wish to trace in every effect its cause, who desire to see in how far the letter of a law corresponds with the spirit of the country in which it is in force, or carries out the national feelings and tendencies, or in what degree abstract right has been respected by legislation, the first and third books of "*Les Eléments du Droit Pénal*," have superior attractions.

Scire leges non est verba legum tenere, sed earum potestatem et vim. This is the principle which animates our author in every page of his treatise on the "rights of action and execution."

He admits of no purely historical or practical teaching of a law, unless the philosophical bearings of that same law be at the same time shown, and unless its original right to be law be proved, not by the fact of its existence, but by its far higher moral ne-

cessity. He seeks every where the concord of law and of justice; and when this fails (as, alas! is sometimes the case), he clearly points the failure out, and adverts to the reforms that would be advisable. If we use the term applied by Descartes' followers to his particular innovations in metaphysical science, we would say that M. Ortolan's "method" is the very best imaginable. It is based upon a perpetual comparison between what is legal and what is just, and it invariably refers what is enacted to what it is rational to enact. For instance, the following subdivision of one chapter will suffice to show how all are subdivided:—

"Chapter II. (of book 1st.)

"Sec. 1, Of the agent of crime in a moral point of view.

Mental faculties considered in their influence on culpability, or on imputability of crime.

"Sec. 2, Influence of age on the conditions of culpability or imputability of crime.

The above, according to natural reasoning.

The above, according to jurisprudence and positive legislation.

"Sec. 3, Modifications of the mental faculties bearing upon culpability or the imputability of crime.

According to natural reasoning.

According to positive law.

"Sec. 4, Of the freedom or subjection of the agent of crime; and, if subjected, of the influence of the said subjection on culpability, &c.

According to natural reasoning.

According to positive law.

"Sec. 5, Of premeditation.

According to natural reasoning.

According to positive law."

It is impossible, we think, not to admit that the above indicates an excellent method in treating such questions, which, indeed, are a necessary part of a conscientious study of criminal law.

The more complete the civilisation of our times becomes, the more law—and, above all, criminal law—will become a subject for the meditations of the philosopher and the physiologist. The human race is being modified every day, and the same punish-

ments are not applicable to individuals in different states or conditions. Let any one take the trouble to read over attentively the trials of celebrated criminals of one or two, three or more centuries back, and he will see that, even there, where the same laws are applied to the same category of crime, their mode of application is altogether different; for the reason, that the individuals to whom they are applicable are, in many senses, completely modified by the progress of civilisation. Not only does civilisation act upon the essential condition of the individual, placing him politically, or socially, or educationally, in this or that condition, but it has an internal and purely moral influence; and according as public opinion adopts firmly any particular creed, or as wealth may happen to be distributed, or the purity of certain principles is more or less upheld, or as a community is inclined to materialism in its habits and pleasures—according to all these various circumstances, will citizens think, and behave, and the law will or will not be in harmony with the general notion of justice, and be or not be obliged to be modified in its special application. Proofs of this need scarcely be adduced; still we may venture, perhaps, to furnish the two following:—

If there is a crime for which any modification of punishment might seem unnecessary, it is the one crime of murder. The fact of a life having been taken is here established, for the human body, whence life has fled, lies before us; the penalty is the one last supreme one; often the agent of crime has confessed, or the proofs of his guilt are so manifest that there is no room left for the smallest shadow of a doubt. Here then, to use the abstruse, yet at the same time expressive, phrase of the Germans, there is “oneness” in the crime—and the legal atonement for it. The offence is, in its results, identical through all time and in all countries: death has been violently occasioned, and the death of the offender is the price to be paid by the one universal law—the law which is identical, and would, as it should appear, give rise to no particular or different interpretation since the period when it was decreed that “an eye” should pay for “an eye, and a tooth for a tooth.” If there can any where be found a law that should escape modification, it would assuredly seem to be that in virtue of which capital punishment follows on the com-

mission of murder; yet how various, on the contrary, are the applications of this very same law, and how the bearings of all the several circumstances of civilisation upon the individual are taken into account. Not long ago the whole English public read the trial of a young man of twenty-four (who, until then, had not been noted as an "idiot") for the murder in cold blood of his mistress. The case was straightforward and plain enough; there was the corpse; there was the crime; there was the agent of crime; and there was the penalty noted down expressly in the text of the law. What, then, could be the "modification" admitted to bear upon the state of the individual? Simply violence of passion, unchecked in childhood, and superinducing uncontrollability of action! The plea made use of by learned medical men was, that "any idea that was exclusively brooded over for a long time, might bring on a physical and mental condition in which a man's actions would be beyond his own control!" Here is physiology brought to bear upon the question of applicability of a most precisely expressed legal precept.

The other case regards the administration, by European laws, over populations belonging to another part of the globe. A Kabyle is tried for the murder of his wife, and for having caused also the murder of his daughter at the hands of his own son. The dead bodies were there, and neither murderer denied the deed; consequently the fact and the law were established; the matter was quite clear. But the element of the private conviction of the agent of crime was here taken into consideration, and it was held that he must escape punishment, because it was irrational to punish a man for doing what he had been brought up to believe, and did believe to be his duty; viz., to slay his relations. Here the modification admitted in the applicability of the law was a social and educational one—a modification of the individual admitted to result from the habits and manners which had all his life been his, and those of his fellow-countrymen. But, from whatever cause, in each case the law is shown to be not absolute, but relative; not identical in its mode of application, but variable, according to the special state and condition of the individual to whom it is presumed to be applicable. It is from this delicate and sometimes indefinite point of intersection,

between what is legal and what is just, that all legal reforms date in every country and every time. Who does not see that, in our age, that hard uniform application of *the law* that was practised two or three hundred years back is inadmissible? But wherefore is it so? Because the position of the individual to whom the law is applicable, is admitted to be, in some one particular, so modified, that the penalty he has legally incurred must be modified correspondingly, and thus the notion of justice rises superior to that of mere legality.

It is unnecessary to say that this is a mark of progress; for the larger the portion of abstract justice contained by law, the better chance has law of being powerful and of being obeyed. But, at the same time, it is impossible not to recognize the extreme hardships with which all this surrounds the administration and application of the law. Supposing it were admitted (which, *up to a certain point*, it perhaps must be) that every or any idea exclusively brooded over might superinduce a state of mind wherein the individual should become incapable of exercising any control over his acts, yet, if the doctrine be carried out far, it is easy to see that the safety of society would be thereby endangered. Who or what, then, is to determine the exact point at which modifying circumstances must be allowed to bear upon the uniformity of the legal text, or the uniform legal text overbear the opposition made in the name of modifying circumstances?

Adverting, too, to the other instance we have mentioned—When is the exceptional condition, produced by a particular state of civilisation, to be reputed no longer existing? When is it to become just to apply the legal penalty incurred by men whose private convictions, and whose conscience, formed by their religion, education, and code of honour, refuse to discuss even the laws of the majority of the nations of Europe? Is the law to be retrograde, and (in order to fulfil its essentially protective mission) is it to incline rather towards a uniform application of its pains and penalties? or is it to grow, with the age, more philosophical, and, arguing a superior sum of reason in its application, is it to be more and more subject to interpretation, and the influence of modifying circumstances? These are great questions; but they

are questions; and it is chiefly as bearing upon their solution that M. Ortolan's work is so important.

There can be no doubt that in France the law, and more especially the criminal law, is still all but purely protective; consequently it is perhaps rather disposed to be retrograde, and to hold more to the uniform application than to admit the modification of the text and its application. The case we have quoted of the Kabyle is an isolated one, and occurred in a country where France is placed in a position different to the one she occupies with regard to her home populations. In Algeria, France has to establish herself; she has, as yet, no constituted society to protect. Now, upon all occasions where, in France, law is brought into contact with the individual, the individual has manifestly the worst of it; in other words, there is comparatively so small a portion of "justice" in the positive law of France, and, above all, in its mode of application, law is so essentially partial in France, and ready—which it perhaps is in no other country—to be active, and to take a violent part against whomsoever is accused of having offended, that the method employed by M. Ortolan in his study of the French criminal legislation, is doubly to be admired and recommended. His reference to reason each time he deals with the origin or the action of a legal text, is excellent, and most useful. He endeavours to compare legality upon all points with abstract justice, and to note how wise it would be in certain instances, to make what is now legal either more reasonable or more just.

In this respect, one of the most curious parts of M. Ortolan's book is that contained in the chapters devoted to the classification of political offences. In all continental countries this category of infractions of the laws is an interesting one, but, for obvious reasons, it is even more so in France than elsewhere; and as, in that excitable nation, the rulers of the day are often the victims of the morrow, it is the point on which the applicability of the penal code is the most important to study.

In the second chapter of his first book, M. Ortolan undertakes to characterize minutely the offences themselves, which come under the head of *Délits politiques*, and here there are many passages it would be curious to quote. His first examination

bears upon "political crimes and offences according to reason;" or, as he terms it, "rational science." This is followed by a chapter upon the same crimes and offences, "according to positive legislation and jurisprudence." In the pages consecrated to political offences, according to the judgment of human reason, the author clearly shows what is the constitution of that fiction called the state; and how far its interests are those of not only the nation as a whole, but of each individual helping to form that whole. "The great public powers being established," he says, "and their several and separate functions being regulated, there remains in every state, whatever its particular constitution, one very important question to settle—namely, what is the precise position of the individual relatively to the collective body? What, in a word, each one in his own person represents, with regard to the association; what he gives of himself to that association; and what he has therefore a right to withdraw from it, his personalty being, as it were, a kind of contribution to the general mass. This is the question, in fact, of equality and of liberty. What freedom, for instance, is left, by the collective being or state, to the individual man, for expressing his thoughts in writing and by means of the public press? What freedom is left him for the disposal of his person independently of the collective will? What freedom of retrenchment in his own domicile, or association with his fellows out of doors? All these are questions, upon the settlement whereof, as M. Ortolan very properly shows, depends the condition of the individual in the state, and, consequently, the particular character that will be assumed by what are termed "political offences;" for these are of one species in one country, and of a totally different species in another.

There is no subject on which law is less absolute, and more necessarily variable, than upon this very subject of "political offences;" and in our happy island we are now so little called upon to know what in reality constitutes a "political transgression," that it may not be without advantage to pass a few moments in the examination of what, amongst our continental neighbours, are such a perpetual cause of contest and disturbance. It is, perhaps, not without some little surprise that we may perceive an impar-

tial, cool-headed, juriconsult, like M. Ortolan, asking himself whether, in his conscience, "political offences" ought, "rationally," "and according to the judgment of human reason," to be placed in the category of those transgressions which are "punishable by penal laws!" He is too French—that is to say, he is too used to the idea of "being governed," of being "cared for"—not to reply in the affirmative, and not to admit that, when "a government is attacked, the criminality of the attack is, beyond all doubt, recognised by human reason (*la science rationnelle*), whether the attack proceed from an individual, or from one of the constituted powers of the state;" but, on the other hand, he is too much of a philosopher not to see to what a number of "modifying circumstances" the application of penal laws to political offences lies open.

"Let us, however, suppose," he observes, "that abstract justice rises superior to all considerations of party, and let us suppose that justice itself decides in favour of such or such institutions, of such or such a political or governmental organization; it is none the less true, that those who attack and seek to overthrow the organization thus approved of by abstract justice, may (and most probably do) so act from the influence of sincere and directly opposite convictions. When penal laws are applied to thieves, incendiaries, murderers, comparatively speaking, little hesitation is required, or at most is it needed to examine whether or not the agent of crime be of sane mind—*i. e.*, responsible; whereas entire and absolute sanity, and consequent capacity of assuming responsibility, being largely admitted, it is, in the case of the political delinquent, matter still for discussion, whether or not he be actuated to the commission of his delinquency by some firm, and in itself meritorious, conviction that he is fulfilling a duty. Even when he is most in error he invokes justice, and believes in justice; and if this belief in the righteousness of his actions be clear and strong, he divides opinion, and often carries with "him the approval and the sympathy of a portion of the public." Here, consequently, must rise up a question as to absolute criminality. Upon the point, also, of the expediency or not of political offences—according as they are or are not successful—the writer of the book before us avows that there is matter

for discussion ; "for," he says, "the *salus populi* is the argument put forth by all parties."

Naturally, this train of reasoning brings him to the mere fact of a certain order of things being established ; and disorder being the consequence attendant upon any abrupt attempt to annihilate the fact of the establishment. Whatever may, this cannot, he says, be forgotten, that the whole battle is here fought by theories, and that ideas are in reality the combatants.

In the chapter which treats of political offences according to positive legislation, M. Ortolan proves that these are treated with a severity by the legal text in France, that puts that text in very unadvisable opposition to reason and justice, and affords the means, under every government, for an exercise of despotic power, and for those irritating and oppressive acts that are of such constant occurrence amongst our neighbours, and that are designated by the name of "*abus d'autorité*."

There is one thing, however, which is extremely curious in this chapter, and that is, the statistical account of the increase and diminution of political offences for the twenty years included between 1830 and 1850. If compared with the progression of other crimes, the list of political offences will seem smaller than might at first have been supposed ; but compared with the statistics of those happier nations, in which it is not a regular occupation to devise plans for overthrowing the established government, the number of political offences in France is still a formidable one. The average stands, for twenty years, at 29 political crimes, and at 196 political offences (*délits*) a-year. As far as other crimes are regarded, this gives a proportion of five political offences to one thousand of the others ; but it is strange to think that, during a space of time ten years whereof were passed in peace, plenty, and prosperity, the average rate of political delinquency of all descriptions should be of upwards of 200 cases a-year. If, from the fact of the crime itself, you pass to the agents of it, you find an average of 108 individuals accused of political crimes, and 333 accused of political delinquencies, per annum ; which, upon the total number of persons prosecuted for all other transgressions against the law in France, gives about fifteen to every thousand. We will quote the whole of the pas-

sage in which M. Ortolan enters into the statistical details of political delinquency in France; for it seems to us that they help to throw a certain light upon the events of contemporary French history.

"We have proceeded by an average computation for the space of twenty years; but, if we come to study the manner in which political offences class themselves for each single year, we shall find a very different account of them. Revolutionary times, and times of general effervescence, naturally augment the sum of these delinquencies, whilst in periods of calm they are diminished. But the particular species of institutions whereby a country is governed, has also a marked influence. For instance, when a censorship exists, and when every printed production has to be authorized by the 'Censure,' few or no *procès de presse* are to be heard of."

It would be too long to follow M. Ortolan's plan of division of political offences into "crimes" and "delinquencies;" we will, therefore, put together all the offences styled "political," and see what is the result of his scale of progression applied to them. "Let us proceed," he says, "by five years at a time, during the space of twenty years. We find the following differences:—from 1830 to 1835, there are 495 political offences a-year; from 1835 to 1840, there are only 76; from 1840 to 1845, only 46; from 1845 to 1850, we have, on the other hand, 281. The rate of political delinquency having been at its very highest in the years following, 1830, it gradually sinks down during those that ensue, until, in the spring of 1848, and during the epoch on which it opens, the rate rises again to almost its former elevation. Somewhere about the same proportion is observable in the number of persons indicted: from 1830 to 1835, we may count 889 persons a-year accused of all sorts of political delinquency; from 1835 to 1840, only 121 are thus prosecuted; from 1840 to 1845, only 102; whilst again, from 1845 to 1850, we find 652 individuals accused of political delinquency."

If, for still further minuteness, we examine here and there an individual year, we find from our author the following curious statement:—"For political crimes, the year 1831 furnishes us with 152 prosecutions, and 533 persons accused; 1832 gives 325

prosecutions, and 1010 accused; 1833 has only 191 prosecutions and 665 incriminated persons. This regards political crime. Political delinquency shows the following figures: in 1831 there are 671 accusations and 1038 *accusés*; in 1832 only 602 accusations and 939 accused parties; whilst in the year 1849, although a very bad one, we have still less, there being but 546 accusations. The number of individuals accused is, however, larger than at any previous period; for, against the 1010 of 1832, we have, in 1849, 1137. The year 1850 shows the progression to be, however, immeasurably greater; for, upon 632 accusations, we count 6661 individuals indicted."

Six thousand six hundred and sixty-one persons accused of political delinquency in the space of twelve months! This fact is an appalling one; and if, in some degree, it may be held to prove the "ungovernability" of the French character, invariably asserted by all who seek to oppress the French nation, it assuredly proves no less the incapacity for any thing like good government in those who assume the responsibilities of power upon themselves.

Since the year 1850, it is no longer possible to arrive at any approximative notion of the number of individuals "accused" of political delinquency; but the simple computation of a certain number of cases made public, and where the inculpatéd stand by twenties and thirties, will suffice to prove that the number of *accusés politiques* must necessarily, since 1851, have increased at a formidable rate. We repeat it, that all this may, up to a certain point, prove that in a country where the inhabitants are so ripe for political delinquency, a system of repression may perhaps be advisable in a limited measure, and cannot all at once be with wisdom given up; but it still more victoriously proves that the nation is misgoverned—that it has neither the laws, nor the administrators, nor the rulers that it ought to have; and that the governmental system, instead of acting with, acts, on the contrary, upon and against the people.

It is impossible to study the question of political delinquency, as it now shows itself in the contemporary history of the French nation, without being forcibly struck by the fact, that never were what are termed "political offences" so frequent as since the

time when the rage for abstract theories seized upon our neighbours, and when they began to build up an entire political, judicial, and social edifice upon new principles, and according to what they are pleased to call *la logique*. "To his honour, be it said, and for his happiness, man is inconsistent," remarks M. de Rémusat, in an essay upon Washington. "*L'homme n'est pas logique !*" Now, here was precisely the error of the revolutionary legislators; they treated the animal man, the necessarily impressionable and consequently "inconsistent" human creature, as if he had been a mathematical quantity; they took into account neither his best nor his worst qualities—neither his sublimity nor his weakness—neither his easy obedience to outward influences, nor his capacity for trustworthiness, if trusted; they rated him at so much, and made, as it were, an arbitrary and uniform estimate of human nature, as a builder would make of so many thousands of bricks and material, and then simply brought their laws to bear upon a community they had fashioned themselves; thus inventing governing theories for an invented governed race. This is the principal reason, as we take it, for the perpetual recurrence of political delinquency in France, under every form of authority. When French governments decree that there shall be a standard boot for the people to wear, we can conceive what will be the outcry of those whose feet are not compressible into the instrument of torture! Yet this is what the legislation of France has done since 1789; and in twenty ways it would be easy to show Frenchmen labouring in every possible manner to escape from what will not fit them, and doing so the most part of the time without exactly knowing where "the shoe pinches."

The whole of M. Ortolan's introduction is well worth reading from this point of view, because, without aiming at "proving" any thing, it does demonstrate what is perhaps the chief cause of all the defects of the French governmental system, and the origin of all the perturbation that for eighty years has never ceased. It shows clearly the systematic rupture of all the connecting links between present and past—the determined repudiation of all "tradition"—the vain, insane attempt to set history at defiance, and to undertake a work that is little less in fact than one of absolute creation; a work impossible to man's limited

nature. This abolition of the past, in its essence and in its consequences, is the one supreme mark of insanity in the whole legislative edifice of the great revolution. It displaces man altogether, depriving him of the position he holds in time and space; uproots him, as it were; supposes him unmodified by the ages that lie behind, and which, in reality, have brought him to what he is. Here is the radical difference between France and every other country in Europe; but, above all, between France and England. We do nothing systematically, but confine ourselves to the work of making just the alterations that the spirit of the epoch appears to demand of us. Our neighbours, on the contrary, one day resolved to "change every thing," and re-made the whole legislation according to their own notions, forgetting only, that to render it applicable, they ought, at the same time, to have also re-made the French race "after their own image."

Let us see what are M. Ortolan's words in the beginning of the chapter entitled "*Du Droit Coutumier*." Speaking of the various sources whence French law is derived, he says:—"The law based on custom (*Droit Coutumier*), gradually formed day after day, and living upon precedent, must necessarily follow the various social and political phases of a nation, and be successively modified by the passage from a barbarous to a feudal epoch, and from a feudal to a monarchic one; each transfiguration of the governmental form transfiguring the legislative one at the same time. This is what happened when, after the barbarous epoch, in which, under a sort of moderate theocracy, ecclesiastical law was the ruling legislative form, the feudal institutions rose up, and assumed the new aspect worn by government; the right of custom took on all hands naturally a feudal shape, and feudalism was reflected in the laws of France. All the consequences of feudalism existed in the legal customs of the France of that period, because at that period they were the essence and vital principles in France of all social life."

Was ever any thing more reasonable than this? Little by little, generation by generation—a race, a nation, modifies and transforms itself socially and politically; and, in a corresponding way, the legal customs whereby it is internally regulated, and its individual members, are held to respect each other's

requirements and rights, are developed and moulded, in short, in harmony with the variations in society. In this way, the largest portion of justice is infused into law; for all the modifying circumstances of civilisation that have been brought to bear upon the individual, are also brought to bear upon the law. Against law thus rationally constituted, though men may frequently offend, they will rarely, if ever, rebel.

“When feudal power,” says M. Ortolan, “received a first check from the establishment of municipal institutions, which, as early as the tenth century, were communicated to northern Europe from Italy and Spain, legal custom obeyed the injunctions of civilization, and allowed itself to be modified according to the spirit of the age. The *communes* of that epoch are, in fact, corporations, free, if not completely, at all events in a very large degree, from any seigniorial control. They take up their position in feudally constituted society as privileged exceptions; but their charters, their regulations, and their usages, are quickly admitted as introducing a new element into legislation, and the legal customs of the time are considerably modified by them. When, later still, the monarchical system, by successive efforts, has attained to the dominion over feudalism; when its action has penetrated from the highest to the lowest spheres, and the monarchical era is definitively founded, the legislation of France is again subject to certain modifications.”

Now, who does not see how much more reasonable and just this mode of proceeding is, than the systematic reforms and erection into law of vague empty theories, practised by the geometricians and would-be lawgivers of the revolution? It is a far too frequent supposition with us in England, that France was a country in which no reforms had been made since the darker ages, and that the revolution of '89-93 overthrew the legal fortress of feudal legislation, which it found standing upright, just as it overthrew materially the Bastille. Nothing can be less near the truth; and it is this that is the chief cause of the many mistakes made by English, and indeed by most foreign writers, when undertaking to treat of the contemporary history of France.

“To have any true notion of what the *Droit Coutumier* of

France really was," says our author, "and to form an exact estimate of the progressive way it had made, it is necessary to refer to the judicial documents themselves, which contain the legal text in its successive alterations; and by degrees, as exterior circumstances press upon legislation, and upon its possible application, it is necessary to study what French jurists term the new, the old, and the very old legal customs (*les nouvelles, les anciennes, et les très anciennes coutumes*)."

It is not without interest to see what are the periods of history corresponding to the above denominations. As for the "*très anciennes coutumes*," we are referred to the feudal laws from the eighth or ninth up to the thirteenth centuries; for the "*anciennes*" customs, we take the whole of the fourteenth and fifteenth centuries; and we would direct attention to the fact that the "*nouvelles*," the modern legal customs of France, come down no later than the end of the seventeenth century. "After that," observes the writer, "this source of legislation is dried up." From the barbarous ages down to Louis XV., France has, like every other nation we know of, an assemblage of legal customs, based upon the particular state of civilization in France, a legislative edifice rooted in the requirements of the race, and growing with them.

After the revolution of the theorists of 1789-93, we find a legislative structure, the natural development neither of time nor successive necessities, but manufactured in a fantastic mood, and for a fantastic community. Nothing fits; this is the standard boot we spoke of, made for the benefit of 35,000,000 of modern Frenchmen, yet 6661 political delinquents in the space of twelve months do not afford very cogent evidence of the skill of the manufacture.

Uniformity is the chief idea of French legislators since the revolution; and during that period it has been very truly said, that "wherever the theorists who governed France found any heads rising higher than their own, they cut them off, simply to bring every one down to the same level." Now, in a large and populous country, composed of many different races, and where, in spite of railroads and electric telegraphs, the stamps of original race is indelible, we take absolute uniformity of law to be per-

haps one of the most impracticable utopias that ever cobwebbed the brains of political theorists. Common-sense is opposed to it everywhere, and practice is against it in the entire fabric of French legislation, up to the fatal period we have marked out. Speaking of the "modern" legal customs of France—those, namely, that extend from the fifteenth to the seventeenth centuries—M. Ortolan says: "All the legislation of these times has a decided monarchical character; laws are framed by royal order, their modifications emanating from the royal initiative; they are verified by the council of state (*le grand conseil*), promulgated in the king's name, and registered by the parliaments. There are general laws for an entire province for instance, by the side of which we find local ones, adapted to a single town only, or to a certain circumscription. * * * * The *Droit Coutumier*, specified in its text, commented on by learned doctors, subjected to the modifications of particular *ordonnances*, remains the source of legislation in France until the radical changes effected by the revolution."

A remark, however, that neither M. Ortolan, nor any other author that we are aware of, has ever made, is this: that never was a nation so thoroughly taken unawares by uniformity as was France, for the simple reason that never was there one, the vital principle whereof had hitherto been so universally that of variety. The constitutional and parliamentary history of Spain only can give us any idea of the legislative subdivision of France up to the middle of the last century. The governmental system of France was in reality that of a parliamentary confederation with a king-president at its head. So perfectly true was this, that the thirteen parliaments of the country would, had they not been carried away by their own ambition, and had not they by their "abuse of authority" raised against themselves both royalty and popular feeling, the thirteen parliaments would have ended by completely ruling France, making her form of government a republico-aristocratical one, and rendering the revolution of '93 a positive impossibility.

It might even be offered as an excuse for the men who carried the worship of legal uniformity to absolute insanity, that they were driven to those lengths by the extraordinary development

of the contrary principle of variety in all French legal institutions. We are not aware that in England any writer has ever commented on this circumstance, or even been struck by it; but it would nevertheless be not unwise to study it, for it lies at the origin of the existing legislative organization of France.

We have been led somewhat from our first object—that, namely, of examining M. Ortolan's work as a comprehensive one bearing upon the penal laws of France—by the curious statements we have found in it connected with the applicability of those same penal laws to political offences. We cannot refrain from recommending to all legal readers the author's dispassionate and liberal argumentation upon the subject of capital punishment in general. Upon this point, of course, above all others, M. Ortolan has before him the necessity for comparing what is just with what is legal; and we can safely say that nowhere has this much-vexed question of the infliction of capital punishment been treated in a more elevated, more enlightened, or more entirely unprejudiced way.

Whatever the opinions on either side as to the applicability of capital punishment to certain crimes, there is no party the members whereof hesitate to admit that the principle of capital punishment is in our times a diametrically different one to what it was in former and darker ages.

In the legislative system of bygone days capital punishment was a vengeance. In a purely historical sense, death inflicted as a penalty was a mere retaliation; it was an act of private vengeance; it next became one of public vengeance, but it was authorized by nothing loftier than a notion of revenge and of sterile punishment. Naturally, from this point of view, the more severe the penalty the better; and hence the revolting cruelty of all the expiations ordained by law during the first fourteen centuries, and more, of modern history. But a day came when the idea of vengeful punishment was replaced by one of a higher, juster, order. The punishment of death came then only to represent the awful necessity imposed by the defence of society at large. From that moment all cruelty disappeared, and the execution of the worst criminal was, whatever his transgression,

the act whereby a fellow-man was deprived of life, *i. e.*, of the means of causing further harm, and as a warning to others.

We need hardly inform our readers that, in our judgment, whosoever desires to have an accurate knowledge of the penal legislative organization of France, in all its branches, and with regard to all its bearings, should give M. Ortolan's book a serious perusal.

ART. X.—*The Common Law of Kent; or, the Customs of Gavelkind; with the Decisions concerning Borough-English.*

By THOMAS ROBINSON, Esq., of Lincoln's Inn. A New Edition, with Precedents, &c. By J. D. NORWOOD, Solicitor. Ashford: HENRY IGGLESDEN, 1858.

THE reasons for the continuance, in the county of Kent, of that peculiar custom by which land descends to all males in equal degree, in equal shares, and the causes of its almost universal spread over that county, while it so rarely occurs in other parts of the kingdom, has never been satisfactorily explained. Among the Anglo-Saxons, *all* the children, female as well as male, inherited the real and personal estate of the ancestor equally, and, in the opinion of Lord Chief-Justice Holt, it was not until about the reign of Henry I. that females, when there were males, first began to be excluded from the inheritance of the real estate, the males still continuing to take socage lands equally amongst themselves.—(2 Hallam's Mid. Ages, 83, 8th edition; *Blackborough v. Davis*, 1 Peere W., 49.) The right of primogeniture seems to have been introduced into the kingdom with military tenures, "it being convenient for the service of the kingdom to preserve the fee entire, to the intent that the tenant by knight-service, who by his tenure was to attend the king in his wars, might do it with more dignity and grandeur, and the choice fell on the eldest son, as he was soonest able to perform the duties of the fee."—(Rob., new ed., p. 11.) It

is not probable that military tenures, in the sense in which the term *tenure* is now understood, were established in England before the conquest (2 Hallam's Mid. Ages, 82—89); and, even if they were, the right of primogeniture was seemingly not applied to them until after that time, for there is no reason to suppose that the law of partible descent was not universal among the Anglo-Saxons. When and how the right of primogeniture first came to be applied to *socage* lands in England, is a matter involved in almost utter obscurity. It is certain, however, that socage lands were partible long after the Conquest; and it was not until about the reign of King John that the rule of partibility so far lost ground in the whole kingdom, except Kent, as no longer to be the presumed law of descent; in that reign, however, the presumption of law was that socage lands, not in Kent, descended to the eldest son, unless it could be proved that they had always been partible.—(Rob., new ed., p. 15.)

The right of primogeniture, probably, was applied by degrees to socage lands, in imitation of the descent of knight-service lands, "the owners of socage tenements choosing rather to deprive their younger sons of their customary share of the inheritance, than that their elder son should not be in a condition to emulate the state and grandeur of the military tenants."—(Rob., new ed., p. 12.) The county of Kent alone retained the old common law, and the reason of this has given rise to some theorizing, which has not, however, led to any very conclusive result.

William Lambarde, the author of "*A Perambulation of Kent; conteining the Description, Hystorie, and Customes of that Shyre*" (a work of authority, written in 1570), thinks (Peramb., p. 28) that the story told by Thomas Spot, "sometime monck and chronicler of St. Augustines, at Canterbury," of the meeting of the men of Kent and the conqueror at Swanscombe, and of the confirmation of their privileges by him, neither incredible nor unlikely. Somner, on the other hand, in his "treatise on gavelkind, both name and thing" (first published in 1660), calls Spot's story a monkish relation, and holds it to be unworthy of credit. "But, first, will it please you to hear the story itself?" writes Somner, who then proceeds to give it as follows:—

"When the Norman conquerour had the day, he took his journey towards Dover castle, that he might, with the same, subdue Kent also; wherefore, Stigand, archbishop, and Egelsin, abbot, as the chief of that shire, observing that now whereas, heretofore, no villeins had been in England, they should be now all in bondage to the Normans, they assembled all the county, and showed the imminent dangers, the insolence of the Normans, and the hard condition of villenage. They, resolving all rather to die than lose their freedom, purpose to encounter with the duke for their countries liberties. Their captains are the archbishop and the abbot. Upon an appointed day they meet all at Swanescumb, and harbouring themselves in the woods, with boughs¹ in every man's hands, they incompasse his way. The next day, the duke, coming by Swanescumb, seemed to see with amazement, as it were, a wood approaching towards him; the Kentish men, at the sound of a trumpet, take themselves to arms, when presently the archbishop and abbot were sent to the duke, and saluted him with these words:—'Behold, Sir Duke, the Kentish men come to meet you, willing to receive you as their liege lord, upon the condition that they may for ever enjoy their ancient liberties and laws used among their ancestours, otherwise presently offering war: being ready rather to die than undergo a yoke of bondage, and lose their ancient laws.' The Normans in this narrow pinch—not so willingly as wisely—granted the desire; and, hostages given on both sides, the Kentish men direct the Normans to Rochester, and deliver them the county and the castle of Dover."—(Somner, p. 63.)

Spot, who lived in the reign of Edward I., was no doubt the inventor of this story; for there is no record or chronicle of any kind before his time to warrant it, and it would, indeed, be remarkable if such an event had escaped the notice of all historians who lived before him. Somner, who takes great pains to point out the inconsistencies in Spot's fable, confesses that he is unable to account for the prevalence of gavelkind in Kent, but supposes (and his supposition is deemed by Robinson to be the most probable) that "the Kentish men, like the Londoners, more careful

¹ "Green boughs, as Mr. Lambard hath it; a likely matter at that time of the year, being about November."—(Somner.)

in those days to maintain their issue for the present, than their houses for the future (a contrary respect to them who have of late, by Act of Parliament, rid their lauds of this custom, as to that property of partition), were more tenacious, tender, and retentive of the present custom, and more careful to continue it than generally those of most other shires were: not because (as some give the reason) the younger be as good gentlemen as the elder brethren (an argument proper, perchance, for the partible lands in Wales), but because it was land which, by the nature of it, appertained not to the gentry, but to the yeomanry, whose name or house they cared not much to uphold, by keeping the inheritance to the elder brother."—(Somner, 89.)

That the Kentish men of bygone days should have been anxious to preserve their custom, cannot be much wondered at; for probably gavelkind tenure was in those days to be preferred to any tenure that could then have been substituted for it; but in the present day the case is quite altered, and the custom of gavelkind has been found to be so inconvenient, that upwards of a quarter of a century ago the real property commissioners recommended its total abolition, and we venture to say that no one who reads the evidence can question the propriety of that recommendation. No step, however, has ever been taken by the legislature in pursuance of the recommendation of the commissioners, probably because the men of Kent, like their ancestors of old, have opposed any interference with their customs. There may also be some few, who, for political reasons, preferring equal partition to primogeniture, and desiring to see the rule of descent, according to the custom of gavelkind, or some modification of that rule, become the universal law of the realm, would naturally oppose the abolition of the rule in the only county in which it to any extent prevails. We cannot here discuss the comparative political advantages or disadvantages of either system; nor indeed, even if such a discussion were proper for these pages, should we think it necessary to enter into it; for practically it is found that, notwithstanding the prevalence of gavelkind in Kent, all the great landed estates in that county are kept together by means of wills and settlements, in the same manner as great landed estates in all other parts of the kingdom, and we believe we are not wrong in

saying that small properties in Kent, descending to numerous co-heirs, are more frequently sold than divided. We may therefore fairly conclude, that were the custom prevalent all over the kingdom, the results would be the same as they are now found to be in Kent, and that land would not be more subdivided than it is at present; thus it appears to us, that the political considerations referred to, have really nothing whatever to do with the matter. Be this, however, as it may, our object is to recall to the reader's mind those inconveniences of the tenure of gavelkind, of a purely legal nature, which arise from intricacies of title, the consequent expense of making out that title, and the expense of transfers.

Mr. Sidebottom, the well-known conveyancer, in answer to a question put by the real property commissioners on the subject, said, "I have not had a great deal of practice in gavelkind, but I have met with a great deal of inconvenience. I have more than once had titles before me, in which it was almost impossible to ascertain with accuracy how far the estate was divided. I know it did come to *half a seventy-second* in one instance, and it was amazingly complicated. I have had several times great difficulty in deducing the title, on account of the subdivisions of the estate. I had one instance in which there were *twenty-nine parties interested in property that was not worth above £300!*"—(1st Rep., App. p. 270.) The commissioners themselves say, "Titles are frequently rendered intricate by the land being frittered into shares, and errors are liable to arise in assurances of the shares. Where there have been several descents or intricate transactions, parties frequently mistake the amount of their shares. It has been proved before us, that instances not unfrequently occur in which, from the minority, or foreign residence, or embarrassed title of some of the parceners, or from the unwillingness of some to concur in the sales or other dispositions of the property, dealings with it are expensive, difficult, productive of litigation or impracticable, and the shares of the parceners able and willing to dispose of them are greatly reduced below their intrinsic value."—(3rd Rep., p. 10.)

This state of things has not much altered since the date of the report;—there may probably be fewer intestacies now than there were five-and-twenty years ago, but all real property lawyers

have, at some time or other in the course of their practice, had to deal with minute shares in gavelkind lands. A case recently came to our knowledge in which it was necessary, in the sale of a small property in Kent, worth less than £200, to obtain the concurrence of a person who had been last heard of in New Zealand, and who was entitled under an intestacy to a forty-ninth share!

The commissioners tell us also, that in trust estates the inconveniences of the tenure in question are more severely felt than in other cases, in consequence of the frequency of intestacies as to such estates, and the difficulty in tracing the pedigree of a family having no beneficial interest in the estate (3rd Rep., p. 11); and we cannot admit that the facility with which the aid of the Court of Chancery may now be obtained in such cases, has done away with the inconvenience of the tenure: it may be less now than it was a score of years since, but it has not ceased to exist.

Moreover, there is an uncertainty as to the nature of the tenure of lands in Kent, it being impossible to say positively whether such lands are gavelkind or not. It is doubtless true that all lands in Kent are presumed, unless the contrary be proved, to be subject to the custom of gavelkind; yet the contrary may be, and is occasionally, proved. And, first, as the custom depends for its existence upon the fact of its having existed time out of mind, those lands in Kent which were *originally* (*i. e.*, about the time of the conquest) holden by knight-service, and have within legal memory been converted into socage lands, are not of the nature of gavelkind. This conversion may have taken place either under the statute 12 Car. II., c. 24, which reduced all military tenures into free and common socage, or may have taken place before the passing of that statute in cases in which knight-service lands may have come into the hands of the crown, and have been again granted out to be holden in socage.—(Rob., new ed., p. 32.) It is said that there were fewer ancient knight-service lands in Kent than in any other county in the kingdom; and the statute 18 Hen. VI., c. 2, notices that there were but thirty or forty persons in Kent who held lands out of the tenure of gavelkind, because the greater part of the county, or well-nigh all, was of the tenure of gavelkind; but still the few that did exist are sufficient to create uncertainty as to the nature of the tenure of all the land

in the county. It must, however, be borne in mind, that a change in the *tenure* does not necessarily destroy the *custom of descent*, which last runs with the land, and not with the tenure; so that land originally of the nature of gavelkind, and within legal memory changed into knight-service land, remains subject to the customary descent.—(Rob., new ed., p. 33.)

The kings of England formerly exercised the prerogative of changing the *custom* as well as the *tenure*; and King John, in the third year of his reign, granted to Hubert, Archbishop of Canterbury, "*et successoribus suis in perpetuum, quod liceat eis terras, quas homines de feodo ecclesie Cantuariensis tenent in gavelkind, convertere in feodo militum,*" &c.: and it appears that, towards the end of the reign of Henry III., the effect of this licence was taken to be such, that gavelkind lands, converted under its authority into military fees, became descendible to the eldest son only (Rob., 3rd ed., p. 64); but in later times, even the power of the king himself to change the custom of descent was not acknowledged; and Lord Chief-Justice Hale was of opinion that the customary descent could not be changed except by Act of Parliament.—(Ibid., p. 80.) We may therefore assume that no lands in Kent, *originally gavelkind*, would now be deemed exempt from the custom, by reason of any alteration in the tenure effected by the crown, or under its authority.

Secondly, there are lands in Kent which have been disgavelled by act of parliament. When the real property commissioners made their third report in 1832, seven disgavelling acts had passed, and we do not know of any that have been passed since that time. Of these seven acts, one was passed in the reign of Henry VIII. (31 Hen., VIII., c. 3), and the remaining six are private acts, not printed in the statute books. The first of the private acts was passed in the reign of Henry VII., and the last in that of James I.; and there appears to be some difficulty in procuring such evidence of the contents of some of them as is admissible in courts of justice (*Doe v. Bridges*, 6 Man. & Gr., 282). In all the disgavelling acts, the disgavelled lands are described only by the names of the owners; and it is supposed that in most cases all evidence of identity is lost, and the lands have returned to the custom. Here, then, we see is another and a fertile source of

uncertainty as to tenure, which nothing but a general disgavelling act can cure.

The evidence of the late John Bell, K.C., on the uncertainty of tenure, is well worthy of attention. He says:—"I think it very probable that questions may arise upon the subject; you find it generally laid down, that all lands in Kent are gavelkind, and that, therefore, no great inconvenience arises; it must be very clearly proved they are not gavelkind, and it is said such proofs cannot be given. I bought an estate the other day, where it was perfectly clear it was not gavelkind. I have purchased three estates in Kent, where I am perfectly satisfied none of them are of gavelkind tenure; and, now the records are thrown open by the parliamentary commissioners, I have no doubt many more such will be found."—(1st Rep., App. p. 228.)

The testimony of Charles Butler is to the same effect:—"Instances have occurred to me," he says (1st Rep., App. p. 113), "in which great uncertainty has prevailed, whether particular lands were or were not held by the gavelkind tenure."

Mr. Bell, moreover, seemed to have thought it probable, that lands in Kent which formerly belonged to monasteries, and were held in frankalmoign, are not subject to the custom. In answer to the question, whether there were not some estates in Kent which had never been gavelkind, having been held *in capite*, he said:—"I have no doubt there are: but there is one description of land upon which the question has arisen, namely, monastery lands that were held, not in gavelkind, but in free alms; I do not know whether there are many lands that have been held *in capite*, but there are many lands that have been monastery lands."—(1st Rep., App. p. 228.) But in the case of *Doe v. The Bishop of Llandaff* (2 Bos. and Pul., New Rep., 491), it was held that the tenure of the glebe lands (if any) of the rectory of Rodmersham, in Kent, which had formerly been part of the possessions of the priory of St. John of Jerusalem in England, and upon the dissolution of the priory had been granted by Henry VIII., to be holden *in capite* by knight-service, had not been altered by appropriation to the religious house. Mr. Norwood refers (Rob., new ed., p. 35, note) to a record of a suit instituted in the reign of Henry III., against the prior of the Holy Trinity in Canterbury, in which the

jury found that the manor of Wells, "fuit quondam manerium domini regis, et quod datum fuit Deo et ecclesiæ S. Trinitatis, in liberam, puram, et perpetuam eleemosynam. Ita quod, manerium illud nunquam fuit gavelkinde, nec partitum, nec est partibile," &c. Mr. Norwood observes that this finding of the jury appears to be at variance with the decision of the Court of Common Pleas in *Doe v. The Bishop of Llandaff*. The cases, however, are perhaps distinguishable, inasmuch as the rectory of Rodmersham was granted *after* the Conquest to the priory of St. John, namely, in the reign of Henry II. (see Rob., new ed., p. 34, note); whereas it appears from a charter of King Æthelred, date A.D. 1006 (the authenticity of which, however, is questioned by Kemble), that at that time Wells (Wyllan) was already among the ancient possessions of the church of the Holy Trinity at Canterbury (Dugd. Monast., vol. i. pp. 88 and 99; Kemble, Cod. Dipl. Anglo Sax., No. 715). The case of *Doe v. The Bishop of Llandaff* *might* have been differently decided as to the glebe lands, had the rectory belonged to the priory of St. John at the time of the Conquest; for the judgment of the court in that case went no further than this—viz., that the appropriation, in times *subsequent* to the Conquest, of any portion of land to a religious house, would not alter its tenure (2 Bos. and P., New Rep., 507), the court did not decide what would have been the effect of such an appropriation, at any time *prior* to the Conquest.

But we must now leave these speculative matters, and return to the consideration of the *special customs* of Kent. We have hitherto spoken only of the peculiar rule of descent to which all gavelkind lands are subject; we now propose to examine cursorily those special customs, annexed by immemorial usage to all lands in Kent of gavelkind tenure, but which, in the opinion of three out of the four judges who decided the case of *Wiseman v. Cotton* (1 Levinz, 79), are not of the *essence* of the tenure, and to which, it was held by the whole court in the same case, all lands in Kent disgavelled by act of parliament remain subject, unless expressly annulled. These special customs, consequently, are perhaps more extensively annexed to lands in Kent than the custom of descent; but it is supposed that they are peculiar to that county, and are not elsewhere to be found in all their integrity.

One of these special customs is, that the husband, so long as he remains a widower, is tenant by the curtesy of a moiety of his wife's land, whether there were issue born alive or not. This custom is, in one respect, more advantageous to the husband than the curtesy of England, inasmuch as by the custom he becomes entitled to his estate by curtesy, even if no issue be born alive ; on the other hand, it is not so advantageous as the curtesy of England, inasmuch as, by the latter, the husband takes an estate in the *whole* of his wife's land, and holds during his life. The real property commissioners, in their first report, recommended an alteration in the law of England, so as to entitle the husband to curtesy whether there were issue born alive or not. No alteration however has, as yet, been made in this respect ; but, probably, the recommendation of the commissioners would now be attended to if their propositions with regard to gavelkind were carried out.

Another of the special customs of Kent is, that the widow is dowable of one-half, but holds her dower only so long as she remains chaste and sole. The commissioners, in their third report (p. 9), say, that, with regard to the proportion of the husband's lands to be enjoyed by the wife, they are not aware of any reason why it should be different in different counties ; but they do not mention the condition under which the Kentish widow holds her dower. In early times, some nice points were raised as to what constituted a breach of the condition as regards chastity, and whether an action would lie for calling a tenant in dower in gavelkind—that which modern delicacy hesitates to describe by any term other than “gay” or “unfortunate.” For a detail of these nice points, we refer the curious reader to Robinson's work (New Ed., 97-102). In modern times, apparently, no case has arisen in which the right of an unchaste Kentish widow (if, indeed, any such there be) to hold her dower, has been questioned ; and, probably, the abolition of this condition, so far as regards chastity, would not very materially endanger the morals of the inhabitants of the county. The condition as regards *widowhood*, some persons may look upon as a beneficial custom, and we are not disinclined to agree with them. Certainly testators, in giving estates to their wives by will, usually limit those

estates to widowhood; and we find the commissioners, in their third report (p. 10), expressing an opinion to the effect, that what prudent owners would do, the law upon intestacy ought to do for them. Yet, if the conditional holding of an estate in dower be considered beneficial, we submit that it ought not to be the custom of Kent alone, but should be the general law of the kingdom.

A third special custom is, that an infant may alien by feoffment at the age of fifteen, and upon this custom the Commissioners make the following remarks (3rd Rep., p. 9): "The power of aliening land at the age of fifteen is, perhaps, defensible as an expedient for palliating the extreme inconvenience which is felt in making out titles to gavelkind lands, on account of the frequency of descent to infant heirs. In any other view, it is an absurd exception to the wise rule of law for the protection of minors, that every contract entered into by a person under twenty-one years of age, unless for necessities, is absolutely void." These remarks, we confess, appear to us to be unanswerable.

A fourth special custom is, that upon conviction of felony, there is no escheat by reason of corruption of blood, or, as an ancient legal bard has poetically expressed it,—

"The father to the bough,
The son to the plough."¹

The statute 54 Geo. III., c. 145, took away corruption of blood in all cases of felony except treason, petit treason,² and murder; and, as the custom never extended to treason, the only substantial advantage which the custom has over the general law of the realm is, that the custom holds for murder. We do not believe that the men of Kent are sufficiently bloodthirsty to render this custom particularly valuable to them.

There are some other special customs of Kent which are obsolete, and we do not propose now to notice them here; a full account of them, however, will be found in the third edition of Robinson's work (Wilson's), and not in Mr. Norwood's; for we

¹ "The fader to the bonde, and the son to the londe," is another reading.

² By 9 Geo. IV., c. 31, s. 2, the distinction between petit treason and murder was abolished.

should mention that the latter, among its many other grave defects, omits all reference to them.

There is not, to our mind, any thing so very advantageous, in any of the special customs we have enumerated, to compensate for the general inconvenience of the tenure, or which will serve adequately to explain how it happens that in the present day, when the simplification of titles to, and transfers of land is occupying so large a share of public attention, a law reform, recommended by the real property commissioners,¹ and one which might be carried out with safety, and, when carried out, would at once simplify all future dealings with land in a great and important county, should be entirely overlooked. "The true, simple, and effectual remedy," say the commissioners (3rd Rep., p. 12), "seems to us to be, to pass an act to disgavel the whole county; and, for the purpose of quieting all questions whether any of the peculiar customs prevailing in the county depend upon gavelkind, to declare that all the freehold lands within the county shall be held in free and common socage, subject to the same rules as other free and common socage lands respecting curtesy, dower, alienation, and descent. Thus, by abolishing the custom of gavelkind, and subjecting all the freehold land in Kent to all the incidents of ordinary socage tenure, a great deal of old law will be taken away, without any danger of new questions arising. Alterations in jurisprudence must always be proposed with anxiety, when they introduce new texts admitting of contrary constructions; but an amendment which abrogates an old head of law, and introduces no new one, is a certain good." The commissioners apparently anticipated opposition to the application of the proposed remedy, for we find in the third report (p. 11) the following remarks:—"It is said that the inhabitants of Kent have a strong predilection for the ancient custom for which their county has been remarkable. Though much regard is due from the legislature to the feelings of those whose interests are to be dealt with, yet this principle is not to be put in competition with a certain and considerable public good. The feeling in this case probably arose from comparing gavelkind in former times with

¹ The 3rd Rep. is signed by (amongst others) the present Lord Chief-Justice of England, Duval, Hodgson, and Brodie.

the tenure which would have been substituted for it, instead of comparing it with free and common socage in its improved state, and must therefore be allowed to have now the character of prejudice."

Had the subject been one of general interest, the legislature would no doubt, long ago, have disregarded the predilection alluded to by the commissioners, and abolished the custom; but when we consider that the custom applies only to a small portion of the kingdom, and that any measure for its abolition would be strongly opposed by those most interested in it, it is not much to be wondered at that the question should have been completely shelved. It is hardly one which a member of the House of Commons, not connected with the county of Kent, would be likely to bring before the legislature; and although it is more than probable that every member for that county, or any of its towns, holding property subject to its customs, has taken excellent care, by means of settlement and will, to do away with the inconveniences of the tenure as regards his own property, and that personally he would have no objection to, but rather would favour, the abolition of the tenure; yet, as the introduction of such a measure by him might cost him his seat at the next general election, it is too much to expect a Kentish member to trouble himself about the matter. No government, on the other hand, cares to raise a question in which the mass are not much interested, and which would probably meet with strenuous opposition on the part of Kentish members looking forward to pleasant autumn meetings with their constituents. On the whole, therefore, we have no reason to doubt that the men of Kent will be left in the full enjoyment of their very interesting but highly inconvenient custom, until the time shall arrive when they themselves, overcoming their prejudices, shall cease to be "careful to continue it."

We have confined our observations to the custom of gavelkind as it affects land in Kent, because the cases in which it occurs out of that county are so rare as to render it a matter of no general importance whether lands elsewhere are subject to the custom or not; and here, in using the term "custom of gavelkind," we must be understood as referring to the rule of descent

alone; for the special customs of Kent, taken as a whole, are, as we have before mentioned, supposed to be peculiar to that county. There are, however, some copyholds and some few freeholds in various parts of the kingdom, in which the rule of descent, according to the custom of gavelkind, prevails. The real property commissioners recommended the abolition of the customary descent prevailing over such copyholds (3d Rep., p. 12), but they entirely ignored its existence as regards any freeholds out of Kent.¹ The reader must seek for the enumeration of the places and manors out of Kent in which the custom prevails, in the third edition of Mr. Robinson's work (p. 42); for here, again, Mr. Norwood has not thought it necessary to give that information.

A question has lately arisen, whether upon an exchange under the inclosure acts, of gavelkind lands in Kent, for free and common socage lands in another county, the tenures as well as the lands are exchanged. If this point were decided affirmatively, the customs of gavelkind might gradually spread over various parts of the country, instead of being confined, as they now almost wholly are, to one county. This question, therefore, seems to us to be one of importance, and we purpose to advert shortly to the case in which it arose. For the convenience of reference we will here transcribe those portions of the general inclosure act upon which the point turned.

By the act 8 and 9 Vict., c. 118, s. 147, it is enacted—

“That it shall be lawful for the commissioners, upon the application in writing of the persons interested, according to the definition herein-before contained, in lands not subject to be inclosed under this act, or in lands subject to be inclosed under this act; as to which no proceedings for an inclosure shall be pending, and who shall desire to effect an exchange of lands in which they respectively shall be so interested, to direct inquiries whether such proposed exchange would be beneficial to the owners of such respective lands; and in case the commissioners shall be of opinion that such exchange would be beneficial, and that the terms of the proposed exchange are just and reasonable, they shall, unless notice of dissent to the proposed exchange shall be given, under the provision hereinafter contain-

¹ There are, to our knowledge, freehold lands in Sussex which descend according to the custom of gavelkind. They were originally of copyhold tenure, and were enfranchised in the reign of Queen Elizabeth.

ed, cause to be framed and confirmed under the hands and seal of the commissioners, an order of exchange, with a map or plan thereunto annexed, in which order shall be specified and shown the lands given and taken in exchange by each person so interested respectively, and a copy of such order, under the seal of the commissioners shall be delivered to each of the parties on whose application the exchange shall have been made; and such order of exchange shall be good, valid, and effectual in the law, to all intents and purposes whatsoever, and shall be in nowise liable to be impeached by reason of any infirmity of estate or defect of title of the persons on whose application the same shall have been made; and the land taken upon every such exchange shall be and enure to, for, and upon the same uses, trusts, intents, and purposes, and subject to the same conditions, charges, and incumbrances, as the lands given on such exchange would have stood limited or been subject to, in case such order had not been made."

By the 94th section of the same act, it is enacted—

"That all such land as shall be taken in exchange, or on partition, or be allotted by virtue of this act, shall be held by the person to whom it shall be given in exchange, or on partition, or allotted, under the same tenures, rents, customs, and services, as the land in respect of which such land shall have been given in exchange, or on partition, or allotted, would have been held in case no such exchange, partition, or inclosure had been made."

Now at first sight it would appear as if there could be no doubt whatever on the subject. Here is an express enactment that the tenures shall be exchanged, and, however inconvenient the result may be, the effect of the enactment cannot, apparently, be doubted. The point, however, was thoroughly investigated by the Master of the Rolls in the case of *Minet v. Leman* (20 Beav., 269), and has been most satisfactorily determined by him. The material fact in that case was, that an exchange of land in Kent for land in Middlesex had been effected by order of the inclosure commissioners, under the authority of the 147th section of the General Inclosure Act. The actual question which the Master of the Rolls had to decide in the case was, whether the inclosure commissioners had power to order the exchange of lands of different tenures, and the point of exchange of *tenure* was but collaterally decided by the learned judge.

The Master of the Rolls said:—"It was justly observed that the statute 8 & 9 Vict., c. 118, relates to two distinct subjects; namely, the inclosure of lands, and other matters not relating to lands inclosed, or subject to be inclosed under the Act. These

latter matters include the exchange of land It is also, I think, clear upon the construction of the statute (assuming the commissioners to have power to exchange freeholds of different tenures), that the tenure of the exchanged land is not altered, but that the Kent land taken in lieu of the Middlesex land remains of gavelkind tenure, and that the Middlesex land remains of the ordinary socage tenure. The tenure must remain unaltered unless the contrary is distinctly enacted by the statute. The only clause which relates to this subject is the 94th section. This clause is, in my opinion, confined to cases of exchange having reference to lands *inclosed under the provisions of the statute*, and it does not, I think, extend to cases of exchange provided for by the subsequent clauses of the Act. The terms of the clause itself, its position in the Act, all tend to the conclusion that the exchanges there spoken of are the exchanges mentioned in the 92nd section, which has reference solely to the case of lands inclosed under the provisions of the statute. The absence also of any words to the like effect in the subsequent clauses relating to the exchange of lands not inclosable, or connected with any inclosure, satisfies me that it was not the intention of the legislature, by this statute, to make it possible that the country should be dotted about with parcels of land of gavelkind, or borough-English tenure; but that, according to the proper construction of it, in the mere case of any exchange under the 147th section, the tenure of the land remains unaltered, and that the owner of the land in common socage obtains in lieu of it land of gavelkind or borough-English tenure, or *vice versa*."

Mr. Norwood states (Rob., new ed., p. 36, note) that the Lords Justices on appeal thought the point doubtful. We do not know from what source Mr. Norwood derived his information, as he has not condescended to refer to any report of the case in appeal. It, however, does happen to have been reported a year ago (7 De G., M., & G., 340), and as there is no reason to doubt the accuracy of the report, we must conclude that Mr. Norwood's statement is not correct. The Lords Justices expressed no opinion on the subject, nor did they express any *doubt*; they decided the case without deciding the point. The Lord Justice Turner, after observing that the Master of the Rolls had been of opinion that

the 94th section did not apply to exchanges under the 147th section, said—"The context, I think, rather tends to support that conclusion; but I think it unnecessary to give, and do not mean to give, any opinion upon the point." The Lord Justice Knight Bruce did not even allude to it. It is indeed much to be regretted that the Lords Justices did not express their opinion on the point; for it is one which may affect the titles to many exchanged lands, and it would be satisfactory to have had it decided by the Court of Appeal, though few lawyers will doubt the correctness of the conclusion at which the Master of the Rolls arrived.

And now, before we dismiss the subject of gavelkind, it is due to our readers who may wish to study its customs, or know where best they may refer for authorities, to say a few words concerning the edition of Robinson's work mentioned at the head of this article, and to consider whether its merits are such as to entitle it to supersede the third edition, published in 1822, which was edited by Mr. Wilson. Mr. Norwood tells us in his preface, "that the work heretofore contained much matter which the various alterations in the law have rendered of no practical utility; this portion has been, accordingly, cancelled, which has considerably reduced the size of the work." Of this last assertion there can be no doubt; the third edition contains upwards of 400 pages, and the present contains 168 pages, besides a few precedents of feoffments of no especial value, and an extract from the third real property report.

Whether Mr. Norwood has exercised a sound judgment in cancelling all that he has cancelled, is a very different matter; and we, for our part, think not only that he has dealt unwarrantably with his author in omitting such parts of the work as have not been affected by alterations in the law made since the previous edition was published, but also that such omissions have in no manner improved the work.

We have already had occasion to notice some of the omissions and defects in the present edition. We will now point out yet one or two more. Robinson's learned and elaborate discourse on the origin, antiquity, and universality of partible descents, in which he treats of the rules of descent among the nations of the world, as well ancient as modern, has been cut down to a meagre

account of the antiquity and universality of partible descents in England. Robinson's chapter (Book I., c. 5) which treats of the nature of the tenure of lands in Kent, is one of the most important chapters in the work, inasmuch as it contains all the learning necessary for determining whether any particular lands in Kent are gavelkind or not. There is little in this chapter which modern alterations in the law have affected; and yet, how has it been treated by Mr. Norwood? Not only has a large portion of it been omitted (as, for instance, all that relates to the prerogative, formerly claimed by the kings of England, to change the custom as well as the tenure of lands in Kent), but paragraphs have been transposed—a course which, if adopted at all, ought to be adopted with the greatest caution and judgment, and duly notified. Mr. Norwood, we regret to say, has, by his treatment of this chapter, rendered it incomplete, inconsecutive, and unintelligible. Again, Robinson added to his work an appendix on borough-English, and gives the following reasons for making that addition:—"There being so strict an analogy between the customs of gavelkind and borough-English, that, according to the opinion of Lord Holt, they differ but in respect of the quantity of the land that the heir takes, and not in construction, I found it necessary, in the course of the foregoing treatise, to take notice of several cases concerning borough-English, the reason of them serving for the determination of some points of the other custom. And it may possibly render the book more useful and complete if I here refer to those cases, and insert what others are to be found in the books relating to the same custom."—(Rob., 3rd ed., p. 385.)

Mr. Norwood, on the other hand, apparently does not think that this appendix adds either to the usefulness or to the completeness of the work, for he has cancelled it, as well as a list furnished by Mr. Wilson, of the numerous manors in which the custom of borough-English prevails. The new edition, we are told, contains the decisions on this custom in the body of the work, and yet the well-known case of *Muggleton v. Barnett* (2 H. & N., 653) is not to be found there. The substantial point decided by the Court of Exchequer Chamber in that case was, that proof of a custom of descent (contrary to the course of

the common law), prevailing in a certain degree of consanguinity, is no proof that such custom extends to a more remote degree. Now, considering the importance of the point, and the number of elaborate judgments delivered, and the differences of opinion which were expressed on the bench, no new edition of any work, treating of customary descent, ought to have issued from the press without this case being duly referred to.

Muggleton v. Barnett may possibly have been reported in the "authorized" reports, after the publication of Mr. Norwood's edition; but it certainly was reported long before in the *Law Journal*, the *Jurist*, the *Law Times*, and the *Weekly Reporter*; and as these serials are not despised by authors and editors of the present day, especially if they be anxious to bring their work up to the time of publication, we see no reason why Mr. Norwood could not have availed himself of them as regards this case.

Many other instances of wholesale and unjustifiable cancellation by Mr. Norwood could be here pointed out; but, as from those already noticed, the reader will have had a fair notion of the manner in which the editor has dealt with the author and the public, we think it unnecessary to quote further examples. Suffice it to say, that much that is interesting, much that is of practical utility, and much that served to exemplify and explain the present state of the law relating to gavelkind, has been omitted.

It is difficult to say what good motive could have induced Mr. Norwood to cancel so indiscriminately and excessively. Have the alterations in the law, made since Robinson's time, rendered all the cancelled portions of no practical utility? Certainly not. But Mr. Norwood has virtually taken upon himself to treat as unimportant and worthless what Robinson and Wilson thought of utility, and what any conveyancer in fair practice could have informed him was valuable. If Mr. Norwood thought he was capable of producing a more practical or a more useful treatise than the one he has undertaken to edit, why did he not try to give to the profession an original work? We must, however, do Mr. Norwood the justice to say that his notes display considerable industry, though they are not always accurate, or always necessary. His note, *e. g.*, on the case of *Minet*

v. Leman, may be taken as a specimen of inaccuracy; and, as a specimen of an unnecessary note, we may mention one (p. 61) in which, after very properly referring to the abolition of the writ of partition, and to the jurisdiction of the Court of Chancery in matters of partition, the editor proceeds deliberately as follows:—"Where, however, all the co-heirs are desirous to make a partition, and are personally competent to bind their interests, no judicial proceeding is requisite to carry that intention into effect; they have only to agree on the allotments to be made to the respective parties, and execute mutual conveyances."—(6 Jarm. Conv., by Sweet, 587.) Now, this passage prefaces, in Mr. Jarman's treatise on partition,¹ an account of the usual mode of determining by ballot, reference, &c., the allotments to be made to the respective partitioners, and in its place may be all very well, but dragged out of it, and prefacing nothing, it appears to be unnecessary; one might as well expect to find a note to the effect that a partition must be made by deed, and that the deed must be stamped.

To conclude, we can commend this edition neither to the antiquary nor to the practical lawyer. The one would not find in it that which would interest him most; the other would not be satisfied with the fragments of Robinson's work, which the editor has strung together in an exceptionable manner. The few new statutes and cases bearing on the subject may readily be found in any digest; and therefore, whether for perusal or reference, Mr. Wilson's edition is, we think, on all accounts to be preferred to the present one.

¹ We have attributed this passage to Mr. Jarman, and we believe we are not wrong in so doing; but the complicated system of braces and brackets, plain crotchets, no crotchets, and crotchets with a J, adopted by Mr. Sweet in his edition of Bythewood and Jarman's *Conveyancing*, renders it a matter of some difficulty to assign with certainty the right paragraph to the right author.

ART. XI.—*Observations in favour of the Concentration of the Courts of Justice, and all the requisite Offices in the vicinity of the Inns of Court, and on the means of defraying the Expense.* 1858.

THIS topic, which nineteen years ago was discussed, has now become one of immediate importance. It was made the subject of consideration of a committee of the House of Commons, re-appointed, in 1845, on the motion of the late Charles Buller, and much valuable evidence was then received.

The courts at Westminster are doomed, and others must in their stead be provided. We shall, we confess, notwithstanding sentiment and ancient associations, part from the old, inconvenient, ugly, and unhealthy rooms and dark passages of Westminster Hall, with great satisfaction; for it is due to civilization that such receptacles for professional men and the litigating public, during their hours of toil, should be swept away.¹

There are two questions, then, which require answers—it having been now established that the present site of the courts at Westminster is to be sacrificed to architectural necessities and public exigencies. The first is, *where* are they to be? and next, *what* are they to be? The answers to both these questions will somewhat depend upon the ultimate determination as to “concentrating” all the courts, both of law and equity, and their various offices, within one building. This seems especially a suitable time for resolving on the proper course to pursue in reference to these important questions; because, whilst the miserable row of rooms at Westminster is about to be levelled with the ground, the ridiculous temporary makeshifts and disgraceful back parlours of the Courts of Equity at Lincoln’s Inn, demand likewise instant and ignominious destruction.

Now, it would seem that the benchers of Lincoln’s Inn either actually have, or are vehemently suspected of having, a design of erecting within the precincts of their honourable society suitable

¹ See an article on this subject, *L. M. & R.*, vol. iii., p. 286, n.s. (Aug. 1857).

courts for chancery, and making them a present, we suppose, to the country at large. We do not know if the improvement of the rents of New Square and its neighbourhood is supposed to have formed an element in the project here referred to ; nor are we aware (supposing this to be an uncharitable supposition) whether it is deemed to be properly within the province of the governing body of the ancient society to distribute its funds for the general good of the country.

The authors of the pamphlet we have named at the head of this article, state the following objection to the Lincoln's Inn scheme. They say, "it would amount to a practical decision against that blending of law and equity, which most thoughtful people consider desirable, and which the legislature has stamped with its approval, and has advanced by acts of parliament. There is not sufficient space in Lincoln's Inn for all the courts, and if new courts of equity were erected there, they could hardly be abandoned hereafter ; and thus, while public opinion and public legislation are tending towards a gradual fusion of legal and equitable principles of jurisprudence, the question would virtually be to a great extent decided in a contrary sense, by the erection of separate courts of equity, under conditions which preclude the future annexation of the common-law courts. While every thing else points to a reunion between law and equity, this would amount, if not to an actual divorce between them, at least to a judicial separation." Again, in the somewhat grandiloquent language which is adopted in this appeal, after urging that the chancellor ought not to preside in a building belonging to a private society, the writer remarks : "It may be a legitimate object of ambition to the benchers of Lincoln's Inn, to place by the side of their magnificent hall other erections in which the highest courts of equity may dispense justice to her Majesty's subjects ; to provide within their own precincts a fit habitation whence equity may issue her high decrees ; but it is not fitting that so august a personage should dwell within private halls, should be the guest however honoured, of a private body however eminent, that the public courts of the realm should be held as it were on sufferance :"—which we may perhaps express more shortly by saying, that it would be inconvenient and unseemly for the treasurer

of Lincoln's Inn to serve a "notice to quit" on the chancellor, or send round one morning a porter for the keys of the vice-chancellor's court. This objection, we would submit, might perhaps be met by care being taken to have prepared the not uncommon instrument called a lease (or, if the stamp be an object to the "august personage," an agreement for a lease), which might be settled and executed by the respective parties thereto. Indeed, whether the Lincoln's Inn benchers erect "fitting temples wherein the homage of a great nation may be worthily offered to the majesty of Justice," or whether the government build courts for the transaction of public business, we apprehend that the British suitor will not be much affected, so long as the best locality is selected, and the best design executed.

Now, without insisting upon the absolute necessity of a "concentration" of the courts of law and equity in one building, we may agree that there would probably be no considerable disadvantage in this course being pursued—care being taken not so to crowd them together as to render concentration confusion; while, on the other hand, no great practical inconvenience would occur in there being any inconsiderable space between them. Notwithstanding frequent attempts made by sanguine and avaricious lawyers, we may lay it down as an established fact, that not even counsel or attorneys can be in two or more places at once, whether these places be one mile or one hundred yards apart; and any temptation to make the attempt held out to practitioners by choosing the shorter distance, will not add to the public convenience.

Sir Charles Barry's suggestion, of appropriating for the purposes of new courts a plot of ground, bounded by Carey Street on the north, the Strand on the south, by Clement's Inn and New Inn on the west, and the line of Chancery Lane on the east, is, if feasible, the best we have yet heard. This scheme, in its present form, involves the necessity of including in one all the courts of law and equity. The neighbourhood of Lincoln's Inn would at any rate be the best whereon to plant those courts, which hitherto have been fixed at Westminster; and we trust that this suggestion at least will be carried out, even if the magnificent idea of concentrating *all* the metropolitan supreme courts in one pile of buildings be

not adopted. We may observe, that we do not at present see why the Basinghall Street courts should, in obedience to the great idea, be shifted from the city, as we conceive some propose; or that much utility would be secured from bringing the polished practice of Portugal Street, with its judicial gravity, its strict principle, and high tone, next door to the halls where the impassioned and brilliant eloquence of equity counsel is reverberating, or the calm logic and profound law of the *Nisi Prius* leaders are lending their aid to the administration of justice.

If new courts of law and equity are now and simultaneously required, it may be desirable to provide for them both at once, and in one harmonious place; but while there is no valid reason that we can see for disturbing other arrangements in connection with bankruptcy and other courts, it should be made a *sine quâ non*, that the common-law courts now at Westminster, be removed into the neighbourhood of the Temple and Lincoln's Inn.

The great scheme, as we may call it, of clearing some seven or eight acres of the land we have pointed out, and erecting there all the metropolitan courts and their offices, has been made the subject of estimate by Sir C. Barry, as follows:—

	£	s.	d.	£	s.	d.
Cost of the Site (about 700 feet by 480 feet, or 7½ acres)	.	.	.	675,074	0	0
Rough estimate of the proposed Courts, combined with the Common Law and Equity Offices, now scattered in various localities	300,000	0	0			
To which add for approaches, foundations, sewerage, warming and ventilating, fire-proofing, gas and water services, fittings, fixtures, furniture and decorations, &c.	180,000	0	0			
Contingent and incidental charges	42,000	0	0			
				522,000	0	0
Gross cost of Site and Building	.	.	.	1,197,074	0	0
Deduct for the value of ground-rents for Chambers to be erected on portions of the proposed site not immediately required for the New Courts and Offices, to be leased for 75 years, with power reserved for repurchasing or occupying the Chambers as Offices attached to the Courts, if required	316,500	0	0			

And for the amount to be realised by the Sale of the Masters', Record and Writ Clerks', Registrars', Accountant-Gen- eral's, and Secretaries of Bankrupts' and Lunatics' Offices	60,000	0	0		
				376,500	0 0
Nett cost of Site and Building				820,574	0 0
From this sum, we conceive, may ultimately be deducted the value of the rent which will be saved for the Offices of the Taxing Masters and the Lunacy Masters	24,000	0	0		
Also the saving of rent for the Offices of all the Common-Law Courts, estimated at not less in value than	50,000	0	0		
To which add the value of the present site of the Courts at Westminster :	86,000	0	0		
And the value of the Rolls' Offices	12,000	0	0		
				172,000	0 0
Ultimate cost of Site and Building				£648,574	0 0

According, then, to this plan, some £700,000 would have to be raised. According to a less magnificent and more rational scheme, proportionally less would be required to cover the cost.

But how are we to raise whatever funds are wanted for the purpose? This question has been answered by indicating certain sums of money under the control of the Court of Chancery, and generally denominated the "Suitors' Fund," as available for the purpose. We will give the facts and figures relating to this branch of the proposal, as stated in the pamphlet before us (p. 5). The funds in question stand to three different accounts:—

"1. 'Account of Monies placed out for the benefit and better security of the Suitors of the High Court of Chancery;' 2. 'Account of Monies purchased with surplus interest arising from securities carried to the account of monies placed out for the benefit and better security of the Suitors of the High Court of Chancery;' and 3. 'Account of Monies placed out to provide for the Officers of the High Court of Chancery.'

"The first fund (which, in fact, can alone be properly called the Suitors' Fund) consisted, on the 1st of October, 1853, of £2,590,928, 18s. 6d. stock, which cost £2,252,464 cash, the average price being within a trifle 87 per cent., and has arisen from investments of sums constituting part of the suitors' cash paid

into court, and not ordered to be invested. The claim of suitors against this fund would be in respect only of their cash paid in. If every suitor claimed his money, and if the funds were not below 87, there would be assets more than enough to meet all the claims. If the funds are worth more than 87, the surplus profit can never be claimed; the suitors' right being to the cash paid in, without reference to the investment.

"The investments have, in fact, been made under special acts of parliament previously to 1838, and since then by special orders of the Lord Chancellor, made under the Act 1 & 2 Vict., c. 54, s. 1. As between the court and the suitors, the latter paid in the cash, but did not obtain an order to invest; and they can only claim the sums they paid in. As the balance of cash in the bank became too large, investments were from time to time made, not of any particular sum belonging to any particular suitor, but out of the aggregate amount; in the same way as a banker invests, for his own benefit, part of the cash deposited in his hands by his customers. Each individual suitor can only claim the cash he paid in, in the same way as a depositor in a bank can only take out the amount he deposited, without reference to the mode in which the bank may have used the money, or the profit the banker may have made from it.

"The only claim, therefore, the suitors can make against this fund, is in respect of the sums deposited by them; and as the price of stock purchased averaged, say, 87 per cent., it is obvious that, even if every suitor claimed every farthing of his money, the fund would answer all demands while the funds are at or above 87. At the present price of the funds, there would be a large surplus, which *no one* could claim.

"It is not, in fact, possible that the persons entitled to every fraction of the Suitors' Fund can be found. It is not likely the funds will be permanently below 87; and we desire to repeat that, unless both these events shall concur, the whole fund can *never* be required.

"On the income of this fund No. 1, are charged large annual sums for compensation and pensions, and for masters' salaries, which are of course terminable as the parties entitled die off; and

the surplus income of this fund No. 1 has been, and is now, dealt with as hereinafter mentioned.

“The second fund we will call the Profit Fund. It has arisen from the investment and accumulation of the income of fund No. 1, before this income was (by the Act of Parliament of 15 & 16 Vict. c. 87, s. 53) added to the Suitors’ Fee Fund. As no suitor could claim *the income* of fund No. 1, it has been invested from time to time, and carried to the Profit Fund; and the sum so invested amounts, with accumulations, to £1,291,629 consols. As between the suitors and the court, the only possible claim the former would have on this, would arise in case the fund No. 1 should prove insufficient to pay them the cash it represents—in other words, if every suitor should claim his cash, if there should be no corresponding cash paid in to meet it, and if the funds should be sold under 87; a state of things obviously impossible. Even if any claim could possibly arise, it would only be to make good any deficiency; and supposing even this were 10 per cent. (that is, if all the fund were claimed, and the funds were at 77), the deficiency would be only £225,246. In fact, it may fairly be said, that no suitor has really any probable claim to one farthing of the capital of this second fund, which can in no sense be called a Suitors’ Fund.

“The income of both funds is at present applied in meeting the expenses of the courts and officers, and upwards of £42,000 is paid in pensions and annual compensations, which are of course terminable, and there is still a considerable yearly surplus carried to the Suitors’ Fee Fund account.

“The pensions and compensation allowances alone (exclusive of the masters’ salaries, which are also terminable, &c.), payable out of the two funds, amount to about £52,000 per annum; which represents a capital, in £3 per cent. stock, of £1,856,600. If, therefore, government would take on themselves the payment of one-third of these terminable pensions, or £18,666 per annum, they would release a capital sum of £622,200 stock. All the objects now provided for by the present income would still be answered, and there would remain upwards of £669,000 for the security of the suitors, in case of any claim on their part—which, in fact, can never arise. The government would have to pay

£18,666 per annum, *terminable as the lives on which the pensions depend drop in*; which is no very great sum compared with the object in view, and is nothing like the annual payment they now make in the shape of rent for hired buildings.

"But there is yet another fund which we will call No. 3. It was commenced in 1833, when fees in Chancery ceased to be received by the officers of the court, and salaries were substituted. This fund No. 3, consisting of £201,028 stock, and standing to an account entitled 'Account of Monies placed out to provide for the Officers of the High Court of Chancery,' has arisen from surplus fees, paid by the suitors, beyond the amount required to meet the substituted salaries. As the amount to be realized by the fees was conjectural at first, it was thought prudent to provide an Indemnity fund against the possible cases of the fees not continuing sufficient to meet the salaries. All fear of this kind has long since passed away; further additions to it have, in consequence, been stopped; and the fund has now no purpose to answer. The income, not being wanted, is paid over yearly to the Suitors' Fee Fund. This third fund also in no sense belongs to the suitors, and the capital is in no way wanted.

"At first, people are naturally startled with the notion of touching 'Suitors' funds. They fancy it means the taking of money belonging to some persons who would be robbed to that extent. It is hoped that what has been said will show that two out of the three funds are not, in fact, funds of the chancery suitors, and that sufficient money may be found for erecting new courts without appropriating one farthing that any suitor can ever claim; and it may be fairly asked how the surplus cash of the Court of Chancery can be more legitimately applied than in providing suitable accommodation for future suitors?

"But, in fact, if precedents for such an application are insisted on, they are not wanting.

"The Suitors' Fund was instituted by the act of 12 Geo. II., c. 24 (A.D. 1739). This act, as well as the three subsequent acts of 4 Geo. III., c. 32; 5 Geo. III., c. 28; and 9 Geo. III., c. 19, directed, that out of the unemployed cash in the bank belonging to the suitors, four several sums, not exceeding together £140,000, should be invested on the Suitors' cash fund account (*i. e.*, fund

No. 1), and out of the interest the salaries of certain officers of the court should be paid, amounting together to £3800; and, as the interest amounted to £4697, 10s., there was an annual surplus of £897, 10s., which was invested on the account before termed '*The Profit Fund*,' fund No. 2, and this surplus interest, with the accumulation of interest, amounted in 1774 to £10,200 bank annuities, and £14, 7s. 2d. cash.

"We then come to an act of 14 Geo. III., c. 43, passed in 1774, and printed among the private acts, which for the present purpose is of some importance; whereby, after reciting that the six clerks' office had become very ruinous, and the offices of the registrar and the accountant-general were, from their situation and condition, in great hazard of being destroyed by fire, and that the surplus interest arising from the monies (part of the suitors' unemployed cash) invested pursuant to the aforesaid acts, then [remaining on the Profit Fund Account, i. e., fund No. 2] amounted to £10,200 bank annuities, and £14, 7s. 2d. cash, '*which annuities and cash are unappropriated, and that it will be no injury to the suitors of the said court if the same, and also the surplus interest which shall arise from the said annuities, and from the securities purchased pursuant to the several acts before mentioned, shall be employed towards raising a fund for rebuilding and erecting the said several offices, and in purchasing such ground as may be necessary for such purposes; and if a sum of money not exceeding £50,000, part of the money [belonging to the suitors of the court], lying dead and unemployed [in the Bank of England], shall be placed out at interest on Government or Parliamentary securities, and the interest thereof, or so much as shall be necessary, applied for the same purposes,* it was enacted, that out of the suitors' unemployed cash, a sum not exceeding £50,000 should be invested, and *out of the interest arising therefrom, and out of the said £10,200 bank annuities, and £14, 7s. 2d. cash,* such sums should be paid as the Lord Chancellor should in his discretion deem necessary, and be applied under the direction of the court in defraying the expenses attending the obtaining that act, and then in rebuilding the six clerks' office, with the offices belonging thereto, and in purchasing ground and houses for that purpose, and the sum of £10,000 in erecting proper and

convenient offices for the registrar and accountant-general of the said court, and in purchasing such ground and houses as should be necessary for that purpose.'

"In 1791, by the Act of 32 Geo. III, c. 42, £300,000, part of the suitors' unemployed cash, was authorized to be invested, and *out of the interest* a sum not exceeding £30,000 was directed to be applied in completing and building the present masters' offices in Southampton Buildings.

"In 1810, by the Act of 50 Geo. III, c. 164, £250,000, further part of the suitors' unemployed cash, was directed to be invested, and *out of the interest* a sum not exceeding £12,000 was to be applied in erecting the present examiners' and the other chancery offices in the rolls' yard.

"Having thus shown the mode in which the *Profit Fund* has been from time to time appropriated, we submit (to repeat the language of the Act of 14 Geo. III, c. 43, authorizing the application of *the whole of the then* accumulation fund in erecting the six clerks', registrar's, and accountant-general's offices) that "it will be no injury to the suitors of the court if *a portion of the présent* accumulation fund shall be employed towards raising a fund for rebuilding and erecting the required courts and offices of justice, and in purchasing such ground as may be necessary for that purpose."

In the evidence of P. W. Rogers before the Committee on Fees (Report, 8th March, 1848, No. 158, p. 86), will be found a more detailed statement respecting the Suitors' Fund.

	£	s.	d.	£	s.	d.
It appears by the Accountant-general's last Annual Return, that the Income of the <i>Suitors' Fund</i> , Nos. 1 and 2, for the Year ending 1st October, 1857 (consisting of the Dividends of Stock), amounted to				116,943	7	6
And that the payments thereout were as follows, viz.:—						
Compensations	30,384	0	4			
Salaries	14,721	0	0			
Retiring pensions	9,196	5	5			
Other payments	4,415	7	6			
Making together				58,716	13	3
Leaving a surplus of				58,226	14	3
Add balance on 1st October, 1856				23,913	7	4
				82,140	1	7

<i>Deduct</i> amount carried over to the Suitors' Fee Fund, as directed by Act of 15 & 16 Vict., c. 87, sect. 53	£	s.	d.	£	s.	d.
				59,041	16	4
Balance on account on 1st October, 1857				23,098	5	3
The income of the <i>Suitors' Fee Fund</i> , as appears by the same return, consisted of:—						
1. Balance on the account on 25th Nov., 1856	62,256	13	8			
2. Amount brought from Suitors' Fund, Nos. 1 & 2	59,041	16	4			
3. Interest of 201,028 <i>l.</i> 2 <i>s.</i> 3 <i>d.</i> Stock, purchased with surplus fees, No. 3	5,741	17	3			
4. Fees levied on the Suitors	101,561	18	8			
				228,602	5	11
And the expenditure was:—						
Compensations	46,874	2	7			
Salaries	101,362	18	3			
Other payments	11,674	19	10			
				159,912	0	8
Balance on the account on 25th Nov., 1857				68,690	5	3

“It is hoped that the foregoing statement has shown that the Profit Fund, amounting to £1,291,629 consols, and the Indemnity Fund, amounting to £201,028 consols, are available funds on which the suitors can have no claim. That the only possible chance of a claim against the former would be, if every suitor entitled to the money paid in were found, and if the stock should be below 87 when sold; and that, as regards the Indemnity Fund, the purposes for which it was commenced has ceased. If, therefore, parliament will give a guarantee against any claim on the above funds (a guarantee which will never cost a farthing), the two funds, amounting together to £1,492,657 consols, may be safely taken; and, in return for this indemnity, which can cost nothing, there will be an immediate saving of the annual rents now paid for offices (say £50,000 per annum). And in a course of no long time, annual sums for compensation, &c., now paid out of the income of the Surplus Fund, amounting to £52,000, will cease.

“There is another mode of raising the funds for the above purpose.

“The Interest of the Stock both on the Suitors' Cash Fund Account and the Profit Fund Account (*i. e.*, funds Nos. 1 and 2), is now applicable to the payment of the salaries and compensa-

tions of the officers of the Court of Chancery; and it appears, from an analysis of the last annual return of the Accountant-general of the Court of Chancery to 1st October, 1857, that the compensations payable to the officers of the court, including the salaries of the masters and their clerks, which, under the Masters' Abolition Act, will cease on their deaths, amount to, in round numbers, £80,000 per annum; and as these are now diminishing to the extent of about £2000 per annum, it follows that, at the expiration of 20 years, £40,000 per annum thereof will cease to be payable. Assuming that £40,000 is, in round numbers, the interest of the before-mentioned £1,291,629, 5s. 6d. Stock on the Profit Fund Account, fund No. 2, we find, on reference to the schedule to the Succession Duty Act, that an annuity of £40,000 per annum, diminishing annually £2000, is of the value of £320,669 cash, or £352,735 consols at £90. If, therefore, £352,735 of the above £1,291,629, 5s. 6d. Stock were authorized to be laid out in the purchase of an annuity of £40,000 per annum, diminishing £2000 per annum, and terminating in 20 years, and a guarantee given by Parliament, by inserting in the Act authorizing the erection of the Courts a clause (similar to the 2nd section of 4 & 5 Wm. IV., c. 68, or the 4th section of 11 & 12 Vict., c. 77), that if the securities on either the Suitors' Cash Fund or the Accumulation Fund should be insufficient to answer the demands thereon, the sum taken for the purposes of erecting the New Courts, or so much thereof as might be required, should be made good by Parliament, it would leave £938,894, 5s. 6d. Stock, which might, without injury to the suitors, be applied in the purchase of the site and the erection of the new Courts of Justice. As an equivalent to the suitors for such an application of a portion of their funds, the government should assume the payment of the rest of the compensations, and the salaries of the masters and their clerks, whereby the suitors would be relieved for the next 20 years to the extent of £40,000 per annum, and for the following 20 years to the extent of £40,000 at the commencement, but subsequently diminishing annually £2000; so that the fees now levied on the suitors might, on the government assuming that payment, be diminished to the extent of £40,000 per annum,

being one-half of the fees imposed on the suitors of the Court of Chancery by the new general order of 30th January, 1857."

We believe the best step towards effecting the object in view would be the appointment of a committee of the House of Commons on the courts of Law and Equity, to whom should be referred the evidence taken in 1842 and 1845; and after obtaining evidence of the present state of the Suitors' Fund, and of the correctness of the rough estimate of the site and buildings, amply sufficient materials would exist for making a report on the subject.

At least equal in importance to the question of where the courts are to be, and how they are to be paid for, is another—How are they to be constructed? Now the legal profession knows, by universal experience, what courts of justice ought *not* to be; but unless the architect of the new courts knows perfectly, and by experience, what is requisite for the purposes of the various courts, he will only add another to the abominations by which the public and profession are annoyed every day. The architect of the proposed building must differ from others who have been hitherto employed in that.—1st. He must know *who* are to be accommodated, and next in what way they are to be accommodated. There are the judges, and their private rooms and passages. There is the bar, with their private and public rooms for consultation, refreshment, and retirement; there are the attorneys and their clerks; jurors sworn in and those in waiting—the parties, their witnesses, and all engaged in cases being actually tried. And further regard must be had for those whose causes are down on the list, and who are "in waiting." And, finally, there is the want of the public, who must, to an adequate (not excessive) extent, be provided for, seeing that English courts are "open courts."

Though all this seems very elementary and almost self-evident, yet our readers for the most part know, by painful evidences, that the essential conditions of a convenient court of justice have been and are habitually violated. Whatever plan shall be resolved upon with reference to the new court (which, we repeat, we hope will be found eventually in the neighbourhood of Lincoln's Inn), we must insist upon the necessity of submitting the design to the consideration of competent people, who know prac-

tically the wants of *all* who have to transact business in courts of justice.

It would be no inconsiderable advantage to the country in general, to have in England at least one good model of a court of law and its offices, where all their essentials and the accessories appropriate to such a building should be regarded. The provinces especially, where such woeful blunders have been made, might profit by a really good example being at hand to study.

We understand that the Law Amendment Society has been reviewing in committee the subject we have been referring to; but its report will not be printed in time to be presented to our readers. The committee approve, we are told, of the great scheme, and their judgment thereon is entitled to consideration.

There is one point, however, which should not be lost sight of, if Sir C. Barry's plan is accepted. It is very well to talk of effecting a "clearance of the miserable lanes and alleys" on the seven or eight acres of land, or rather of brick and mortar, in the vicinity of Lincoln's Inn; and it sounds still more plausible when it is urged, that such a plot of ground is the "abode of vice in every shape," and that its "destruction would be of great advantage to the neighbourhood"—but something more remains now-a-days to be considered, than "great advantage" to a "respectable vicinity." The dense population inhabiting these seven acres are surely not to be coolly told to "move on," because the lawyers want more room, and Sir C. Barry ample verge, to erect a noble perpendicular, or decorated building! No improvements of this sort, whatever may be their claim to the admiration of the respectable classes, should be listened to, until provision is made for the habitation of the poor, who hitherto have been frequently sacrificed to the good pleasure of the well-to-do people, who in return express great approbation of the fine taste and handsome reforms exhibited in clearing out poor neighbourhoods. The cost of the grand architectural feats in Paris, may be reckoned at more than the millions of francs for which the Emperor has rendered his subjects liable. Discontent, the effect of the cruelty in this system of wholesale ejection; and disease, the consequence of overcrowding the remaining indigent districts—are fruits of the splendid "improve-

ments" in the metropolis of France. We do not desire to earn the like wages for our magnificent architectural triumphs in London. It is true that vice may be found in the streets and alleys in the neighbourhood of Carey Street; but those whom charity or other motives may have drawn to the quarter, know that amongst its many needy inhabitants, a large number also are there residing who belong to the industrious classes, and are above want; and who, because they are, unhappily, not lodged better here, should certainly not be condemned to lodge worse elsewhere in a more cramped and more crowded district, which peradventure would be more inconveniently situated with regard to their daily occupation. Now that the tax on bread is removed, we apprehend no oppression of the poor—by which term we would signify not only those approaching the condition of pauperism, but those belonging to the classes of artisans, journeymen mechanics, warehouse servants, and day labourers—is so grievous as that which scants, contracts, and poisons their dwelling-places. Whilst the cholera, typhus, and diphtheria are reading their lectures personally to the influential and wealthy, they resolve to look for some remedies for this cruel evil, and make a spasmodic effort which savours of philanthropy; when, however, only low and slow fever, and daily doses of poison, are consuming those removed from respectable eyes, and the upper classes enjoy comparative immunity, these attempts are relaxed, and the result is, that the homes of the poor remain much the same, except when each new clearance induces permanent diminution of their house-room.

If the dwellers between Lincoln's Inn Fields and the Strand are simply ejected, indifferent as their present homes may be, those they must put up with elsewhere will be worse and dearer. If concentration of the courts involves the necessity of first thrusting out a multitude of hard-working people, that they may throng some already over-populous neighbourhood, we trust the plan, however magnificent, based on such a principle, will be repudiated.

We are, however, inclined to believe that the scheme must be modified, and connected with it a plan discovered of appropriating a sufficient portion of the ground in question for commodious

habitations, suitable to the classes of those who now inhabit the district in the neighbourhood of the Inns. Not only clerks and laundresses, and those in the law-stationers' employment, but those who print and prepare for press the learned lucubrations of the barrister-at-law, stitch and bind his heavy tomes, and help to distribute them far and wide, might there find better built, better arranged, more economical, healthy, and decent dwellings, than what they now call homes. If we can so provide better accommodation for those who minister to our daily necessities, it will be a work more noble, because in performance of a duty more incumbent on us, but hitherto much neglected by us, than the raising of a fabric grand in extent, pure in style, and perfect in execution.

We would rather the various courts were scattered broadcast between Mile-End, Pimlico, Hampstead Heath, and Clapham Common, than that the legal profession should adopt any unjust scheme in endeavouring to erect what might be pompously designated a "temple of justice," but which would, in fact, remain a monument of iniquity and of selfish folly.

ART. XII.—THE BAR EXAMINATION QUESTIONS.

HILARY TERM, 1859.

AS we have, on previous occasions, found it acceptable to our readers to print the examination papers proposed for students for the bar, we now present those of Hilary Term, 1859. The rules of the council of legal education are, we understand, again under consideration for the purpose of revision. At present, those which have been laid down with the object of inducing students to enter themselves at the examination, remain as follows:—

"Studentships shall be founded of fifty guineas per annum each, to continue for a period of three years, and one such studentship shall be conferred on the most distinguished student at each public examination; and further, the examiners shall select and certify the names of three other students who shall

have passed the next best examinations; and the Inns of Court to which such students belong, may, if desired, dispense with any terms, not exceeding two, that may remain to be kept by such students previously to their being called to the Bar. Provided that the examiners shall not be obliged to confer or grant any studentship or certificate, unless they shall be of opinion that the examination of the students they select has been such as entitles them thereto."

"At every call to the Bar, those students who have passed a public examination, and either obtained a studentship or a certificate of honour, shall take rank in seniority over all other students who shall be called on the same day."

"No student shall be eligible to be called to the Bar who shall not either have attended during one whole year the lectures of two of the Readers, or have satisfactorily passed a public examination."

*Questions by the Reader on Constitutional Law and
Legal History.*

1. What was the law of evidence in cases of treason at the death of Charles the Second?

2. Mention any cases between the reigns of Edward the Sixth and James the Second in which it had been disregarded, or misrepresented, by the judges.

3. What were the admitted constitutional rights of the Commons in the days of Elizabeth?

4. What was the object of Charles the Second in sanctioning harsh laws against Protestant Dissenters?

5. What was Peacham's case? When was the doctrine laid down therein overruled?

6. Mention the date and substance of any remarkable document put forth by the House of Commons, during the reign of James the First, in support of their rights.

7. What is the act under which the bishops require subscription to the Articles from persons wishing to be ordained? and how does the practice agree with it?

8. Is Blackstone correct in asserting that a commoner cannot be impeached?

9. Mention instances in which the right of impeachment has been exercised, from the earliest period to the reign of George the First.

10. What was Bracton's opinion as to the prerogative of the Crown?

11. Who were the members of the Great Council from the Conquest to Magna Charta?

12. What distinction as to the great barons and the less powerful tenants holding immediately of the Crown do you find in Magna Charta?

13. How can a freeman be lawfully punished according to Magna Charta? and what interpretation do you give to the expressions limiting the mode of punishment?

14. State any instances, from our history, in which this clause has been violated.

15. State instances, from our history, in which judges have arrested the claims of prerogative.

16. If the King order Titius to arrest Caius, and the arrest cannot be justified, has Caius a right of action against Titius?

17. When, and by whom, was the rule on this subject first laid down?

18. What were the chief guarantees of English freedom on the accession of Elizabeth?

19. What was Cavendish's case?

20. Give an account of the Habeas Corpus Act.

21. What rights had the House of Commons succeeded in establishing, at the close of the reign of James the Second?

Equity.

1. Mention the various modes of commencing a suit in Chancery, and state generally the nature of the cases to which each is adapted.

2. Plaintiff and defendant die before decree. Can any and what step be taken in the cause:—1stly, by the representatives of the plaintiff; 2ndly, by the representatives of the defendant?

3. When can the case of the defendant be properly stated by way of plea? Two defendants, each relying on the same case (which can properly be made by plea), defend the one by plea,

the other by answer, stating merely the same fact as that stated by the plea. What issues are raised by the plea and answer respectively?

4. A father agrees, in a written document signed by him, in consideration of natural love and affection, to pay an annuity of £100 to his daughter for her life, and forthwith to surrender certain copyhold lands, of which he is the legal tenant in fee, to the use of her and her heirs. The father dies without fulfilling his agreement. Can the daughter enforce the whole or any part of it in equity?

5. A father purchases lands, and, by his direction, the conveyance is made unto and to the use of his two daughters and their heirs. He purchases other lands, which, by the like direction, are conveyed unto and to the use of the two daughters, a stranger, and their heirs. One of the daughters dies in the father's lifetime. Upon his death intestate, leaving a son, the other daughter and the stranger surviving, who is entitled to the lands?

6. Explain and illustrate the expressions "a power coupled with a trust," "a fraud upon a power," "an illusory appointment." Has the doctrine of the court respecting illusory appointments undergone any and what alteration?

7. An unmarried woman is entitled to an equitable term of years; she marries without making any settlement, and joins with her husband in assigning the term by way of mortgage to a person who advances money to the husband. The mortgagee files a bill of foreclosure. Can the wife insist on her equity to a settlement out of the term in priority to the mortgage?

8. Lands are devised to A. and B. and their heirs. A. lays out money on the land in permanent improvements. Upon his death during B.'s lifetime, can the representatives of A. maintain any and what claim against B.?

9. A. makes a mortgage in fee, and dies intestate without heirs. To whom does the equity of redemption belong, and is it subject to any, and what charges?

10. A. is seised to himself and his heirs of a freehold house, possessed of a term of two years in another house, and has a sum of £10,000 stock standing in his name. He holds this property upon trust for B., his heirs, executors, and administrators. B.

gives a parol direction (clearly established by evidence) to A., desiring him to hold the two houses and stock upon trust for C. absolutely. B. dies intestate; the property is claimed by his heir and personal representatives, and by C. Who is entitled to the houses and stock respectively?

11. In what manner did the jurisdiction in lunacy originate, and by whom is it exercised? Under what authority is a committee appointed?

12. Pending a treaty of marriage, the intended wife makes a settlement of all her property on herself for life for her separate use, with remainder to her children by a former marriage. The settlement is not communicated to the intended husband. The treaty is broken off, and the lady marries another person, who is also without notice of the settlement. Is it valid as against him?

13. A testator bequeaths £100 to A. B., and £200 for the purchase of an organ for a parish church. His personal estate, which entirely consists of movable chattels, is worth £150; his real estate is worth £1000; his debts amount to £300. Shall his legacies be paid to any and what extent?

14. The mortgagor of a copyhold estate dies indebted to the mortgagee on simple contract, as well as on the mortgage. Is the mortgagee entitled to tack the simple contract debt; firstly, as against a devisee of the copyhold; secondly, as against creditors of the testator by specialty; thirdly, as against his creditors by simple contract.

15. A female executrix commits a *devastavit*, marries, and dies before her husband. Has a creditor of the testator any remedy against the husband at law or in equity? What is the reason of the rule on the subject?

16. A., B., and C., who are partners in trade, execute a joint bond to secure a partnership debt; they execute another joint bond, as sureties for a person employed in an office of trust, who becomes a defaulter: A. dies. Is there any remedy in equity against his estate upon the bonds, or either of them?

17. One seised in fee of an estate conveys it to trustees upon trusts for the benefit of his wife and children. He afterwards deposits the title-deeds of the estate as a security for a sum of money advanced by a person who has notice of the settlement. The de-

positee institutes a suit against the depositor, his wife and children, for the purpose of enforcing the security. Is he entitled to any and what relief?

18. A wife joins with her husband in mortgaging her estate of inheritance to secure money advanced for the use of the husband; and the provisions of 3 & 4 Will. IV., c. 74, as to her separate examination, &c., are complied with. The husband covenants to repay the mortgage money. Is the wife entitled to have her estate exonerated from the debt after the decease of her husband; firstly, as against his legatees; secondly, as against his creditors?

NOTE.—Where an opinion is required and given, the reasons on which the opinion is founded must also be stated. It is not essential that authorities should be quoted, but whenever they are remembered this should be done.

On the Common Law.

1. Define the terms Simple Contract—Deposit—Mandate.
2. What is a *nudum pactum*? State the rules of our law with respect to it, and illustrate its operation by examples.
3. In what sense is the word "agreement," used in the fourth section of the statute of frauds, to be understood? What is the leading case upon this point?
4. How may a misjoinder of plaintiffs in an action be amended, (1) before, (2) at the trial?
5. With what object may it be necessary to "renew" a writ of summons?
6. What is the rule now established for testing the validity of a contract in restraint of trade?
7. In whose name or names may an action be brought upon a bond given to a married woman during coverture?
8. State shortly the extent of liability *ex contractu* attaching to an infant—distinguishing between his void and voidable contracts.
9. Specify the leading exceptions to the rule at common law, that a corporation must contract under seal.
10. State the facts in *Armory v. Delamirie*, and the principle of law established by that case.

11. What is the period of limitation in an action of covenant ? and of debt on bond ?

12. What would be the main ingredients in the right of action upon facts, such as in *Chandelor v. Lopus* ; 1st, if the declaration were framed in contract ; 2ndly, if it were framed in tort ?

13. Distinguish between a *patent* and a *latent* ambiguity, and state the rule respecting the admissibility of extrinsic evidence to explain either.

14. How may judgment be signed in an action for non-appearance, where the writ of summons was not specially indorsed ?

15. What is the time allowed for pleading in bar ? and in abatement ?

16. On what grounds may one tendered as a witness now be rejected, as incompetent to give evidence at a trial ?

17. Define the offence of conspiracy. Is it a felony or a misdemeanour ? And give instances of conspiracies which would be indictable.

18. Specify various grounds on which the motion for a new trial is ordinarily made.

19. Explain shortly the leading provisions of Lord Campbell's Act, 6 & 7 Vict., c. 96, with reference to the law of libel.

20. Specify various particulars in respect of which an indictment is now amendable under the stat. 14 & 15 Vict., c. 100, s. 1.

21. Exemplify the meaning of the word "conversion," used with reference to the action of trover. And distinguish between the *absolute* and *special* property in a chattel.

22. A surgeon undertakes gratuitously to attend a sick person, and injures him by improper treatment. Explain fully the law here applicable for determining the civil liability of the surgeon.

On the Law of Real Property.

1. Into what two classes is property in England divided ? To which of those classes do the following estates and interests respectively belong, viz. : a term of 1000 years in land—an estate for one's own life—for the life of another—during the widowhood of a woman—for ninety-nine years, if A. B. shall so long live ?

2. There are a few instances in which technical words are absolutely necessary to the validity of deeds relating to land :— What are those instances ?

3. A mortgagee has a power of sale, prior in creation to the date of judgments against the mortgagor ;—can the mortgagee make a good title against the judgment creditors ? and what are the rights of the creditors in the supposed case ?

4. What is the effect of a late statute as to the liability to pay mortgages on devised or descended property ?

5. Give, shortly, the common uses in bar of dower in a conveyance of freehold property ;—also, the heads of the covenants for title in a conveyance from A. (a bachelor) to B. in fee ; also, the heads of the covenants for title in a mortgage in fee from the said A. to B. ; and show in what particulars the covenants in the conveyance and those in the mortgage differ.

6. Are there any, and if any what, words which will now imply a covenant for title in instruments affecting lands ? How is that implication rebutted ?

7. A mortgagee in fee dies intestate ; who are the necessary parties to a re-conveyance of the mortgaged property, or a transfer of the security ?

8. What form of deed would you select as the best for carrying out an exchange or a partition of land ? Give the reasons for your answer.

9. How can land be effectually given to a charity ; and is there in the so-called Mortmain Act any, and if any, what provision personal to the donor, a fulfilment of which is necessary to the validity of the gift ? Must the requisite lastly referred to with respect to the donor be fulfilled with respect to the grantor in the case of a *bonâ fide* sale by him to a charity for valuable consideration ?

10. What property may be given to a charity by will ?

11. What were the respective objects of the statutes *De Donis* and *Quia Emptores* ? How and in whose case were the provisions of the statute *De Donis* first evaded ?

12. To what extent is a peer or a member of the House of Commons affected by the Bankrupt Laws ?

13. State a few of the most usual acts or omissions of a trader

which constitute acts of bankruptcy. Within what period after the act of bankruptcy must the petition for adjudication be filed?

14. A trader by deed conveys and assigns all his real and personal estate to trustees for the benefit of his creditors; in what manner and with what accompanying formalities should such a deed be perfected, so that the property of the trader may be the most quickly available for the purposes of that deed?

15. In what way are the copyhold estates of a bankrupt disposed of and dealt with under the provisions of the Bankruptcy Act?

16. A mortgages a trust estate, or an equity of redemption in fee simple hereditaments, and a policy of assurance, to B. Is notice to the holder of the legal fee, or the first mortgagee, or the assurance office, absolutely necessary? and, if necessary, for what reason in each case?

17. Under what circumstances is a purchaser affected by actual or constructive notice to his counsel, solicitor, or agent?

18. Are there any, and if any what, cases in which a purchaser, even with notice of prior encumbrances upon, or dealings with, real estate, may get a good title against those dealings and encumbrances?

19. Is the registration of a judgment—or bill of sale—or annuity deed—or of a deed in the Middlesex or Yorkshire Registry—notice to a purchaser? And is a purchaser who is fixed with notice of the existence of any of the above liabilities, which are not duly registered, bound by all or any, and, if any, which of them, though un-registered?

20. By the second section of 8 & 9 Vict., c. 106, it is enacted, that all corporeal hereditaments shall lie in grant as well as in livery. Explain this enactment, and show how it has affected the system of modern conveyancing.

21. In what manner did the statute 8 & 9 Vict., c. 106, affect the law of contingent remainders? Notwithstanding that statute, are there any cases now in which trustees to preserve contingent remainders are necessary, and, if so, for what reasons?

22. What additional powers of alienation did the statute 8 & 9 Vict., c. 106, confer upon the owners of contingent, executory, and future interests, and possibilities coupled with an interest?

What were the powers of alienation which those owners possessed before the passing of the lastly-named act?

Jurisprudence and the Civil Law.

1. What are the nature, requisites, legal force and proof of customs, according to modern civil law?
2. What general rules does the modern civil law lay down as to the effects of *ignorance* and *mistake*?
3. Explain and illustrate the difference between the *grammatical* and the *logical* interpretation of laws.
4. What is the difference between a right *in rem* and a right *in personam*, and the corresponding difference between an *actio in rem* and an *actio in personam*?
5. Explain the legal mode of computing time according to Roman law.
6. Explain what was meant by a woman's passing *in manum viri*, and state the legal results of the process. How did these results differ from those of marriage as regulated by the later Roman law?
7. Explain the nature of *capitis deminutio*, and enumerate its forms, tracing them all to a common origin.
8. Explain clearly the character of the Roman tutelage, and the meaning of such expressions as *auctor fieri*, *auctoritatem interponere*.
9. Define a servitude, and state whether you consider it more akin to property or to obligations. What are the requisites of a legal servitude?
10. State what was originally the difference between *usucapion* and *prescription*, and enumerate the conditions which the later Roman law required to be satisfied, in order that the shortest form of *prescription* might operate.
11. What rules was a Roman testator under the necessity of complying with as to the disinherison and institution of children and near relatives? What were the consequences of disregarding these rules?
12. Explain briefly the provisions of the *Lex Falcidia*, the *Senatus-consultum Pegasianum*, and the *Senatus-consultum Trebellianum*, and state why it became necessary that these statutes should be passed.

13. How far does the judicial power of independent states extend?

14. What was the *Consolato del Mare*? Where is it supposed to have originated? and what have been its effects on modern international law?

15. State briefly the chief differences between the constitutions of the Swiss Federal Union, of the United States of America, and of the Germanic Confederation.

16. Describe in general terms the character of the laws which, by the comity of nations, are allowed to operate *extra-territorially*.

General Paper.

1. What were the original functions of juries, and at what time and how did they become what they now are?

2. Give an account of Simon de Montfort and his proceedings, as they affected the constitution.

3. Compare Magna Charta and the Bill of Rights, and show how the outline drawn in the one was filled up in the other.

4. A contract for the purchase of land is abandoned on the ground that the vendor cannot make a good title. Has the vendee a lien on the land for his deposit? State the principal grounds of argument on each side of the question, and refer to decisions.

5. A client, immediately after the successful termination of a suit, executes a deed, granting to his solicitor in the suit (in addition to his costs) a considerable portion of the client's real and personal estate. He afterwards makes a will confirming the dispositions of the deed. The will, but not the deed, is prepared by the solicitor. No evidence is given as to the existence or absence of undue influence. Can the deed and will, or either of them, be impeached in equity?

6. A fund is settled upon trust, after the decease of A., for such of his children living at his decease, and in such shares as he shall appoint; and in default of appointment, or so far as the same may not extend, for such children equally. He appoints one-third to each of two children who are living at his decease, and one-third to the child of a deceased child. He also bequeaths legacies to each of his two children. Upon his decease, leaving the grandchild, the two children and no other child

surviving, to what are the children entitled under the will and settlement?

7. A. having at B.'s request consented to allow his horse to pasture gratuitously with A.'s horses, puts them together for the night-time in a field, the fences of which are defective; B.'s horse during the night falls through a gap in the fence into an adjoining field, and is killed. Is A. liable to B. for the damage thus sustained by him?

8. In *Mostyn v. Fabrigas*, Lord Mansfield observes, that "If two persons fight in France, and, both happening casually to be here, one should bring an action of assault against the other, it might be a doubt whether such an action could be maintained here." State your opinion with reference to the case here put, and the reasons upon which it is founded.

9. *In pari delicto potior est conditio defendentis*. Put cases illustrating the meaning of "*par delictum*" in this maxim.

10. Define, and explain the difference between a reversion and a remainder; and show how those estates respectively are affected by the system of tenure and the law of escheat.

11. A. devises or conveys two fee simple estates, one of them to B. and his heirs, upon trust for C. and the heirs of his body; the other to B. and his heirs, upon trust to settle the same upon C. and the heirs of his body, so as to prevent C. from defeating the entail. Under what classes of trusts respectively would you place these two devises or conveyances? and show what would be their effect respectively as to the dominion of C. over the two estates.

12. What considerations were requisite to raise a use or trust before the passing of the Statute of Uses? Have those considerations been governed by the same rules since the passing of that statute?

13. What are the general presumptions of Roman law with regard to the pre-decease and survivorship of persons, the exact time of whose death is not known?

14. What is the voluntary, what the conventional, and what the customary law of nations?

15. According to what law is succession to the property of intestates dying in a foreign country to be regulated?

**ART. XIII.—REMARKS ON CERTAIN DEFECTS IN
THE PROCEDURE OF THE DIVORCE COURT.**

A SUBJECT to which Lord Brougham has lately directed the attention of the Law Amendment Society, is of great and even of pressing importance, because there appears an imminent risk, in some cases, of a failure of justice, and in others of the very evils which the adversaries of the new jurisdiction chiefly dwelt upon, and to shut out which no proper security seems afforded by the constitution of the court and its course of procedure. It appears that this court is left in a state utterly helpless, whatever suspicion it may entertain that its jurisdiction is perverted to the worst of purposes by the contrivance of parties acting in concert and collusion, while pretending to be real antagonists. His Lordship stated, in his letter to the Society, that there might be two kinds of collusion; one, upon certain facts existing to obtain a dissolution of the marriage; the other, to do something which should bring the case within the jurisdiction of divorce. Perhaps the best illustration of both these cases is to state what is known in several instances to have taken place where, as in Scotland, the woman can obtain a divorce *à vinculo*, and then to state the more ordinary case of the husband applying for the dissolution of the contract. A. and B. being married, and both desirous of a divorce, and knowing full well that if B., the wife, commits adultery, she loses her place in society, but that, if A. does so, he suffers no such penalty, agree that the latter shall commit the crime, and furnish B. with evidence of it, so that she may sue for divorce, and each may contract a new marriage. A. has no difficulty under this new act; because, although his accomplice in the adultery must be made a party, yet, as she will probably be a woman of abandoned habits, to whom no injury can arise from such an exposure, for a trifling recompense she will suffer the proof to be brought and the suit to proceed. The court, of course, has no power to examine that party. But suppose there were some connection of the husband or wife, who had an interest in preventing the divorce, and had

abundant proofs of the whole contrivance, as the law now stands none of these proofs could reach the court. For, suppose that they knew of the contrivance through witnesses to a conversation between A. and B., or by letters under the hand of either, or of both, nothing of this could be even attempted to be given in evidence; because, by the supposition, neither A. nor B. could desire to have a tittle of it brought forward. In the letter to which we have referred, cases were adverted to in which, matters having come to the knowledge of peers while the jurisdiction was confined to parliament, divorce bills were thrown out in consequence of these peers sifting the case at their bar, where, of course, they had no help from the advocates of either party. These were cases of the husband applying; but there would have been a still greater facility had the wife been the petitioner.

It is, however, not only in such cases as the adultery being committed for the purpose of obtaining the divorce, that collusion of parties ought to prevent the sentence. Suppose the funds for prosecuting the suit are furnished by the party on account of whose adultery with the wife the husband applies for a divorce, this ought manifestly to prevent the sentence if it could be brought to the knowledge of the court; but it could not come judicially to the court's knowledge unless by the merest accident, such as a gross blunder committed in the course of the suit by the advocate or agent of any of the parties; for both have an equal interest in keeping such a fact carefully concealed. Again, suppose the correspondence between those parties to fall into any person's hands, so as to leave no doubt that the whole proceeding was, from the beginning, a conspiracy to deceive the court into passing a sentence which all the three parties alike desired—the husband, the wife, and the adulterer—still, as the law now stands, and as the procedure under it is arranged, the court must needs be the dupe of the conspirators, and must pronounce judgment upon the supposition that there is a real suit before it between contending parties, whereas there is only a sham or pretence of a suit. In order to try how far such a proceeding ought to succeed, let us assume that both parties—husband and wife—joined in a formal application for dissolution of the marriage, on the allegation of adultery committed by the wife, and that the adulterer also joined in the application, can it

be doubted that the petition would be at once refused? The court says, "by the law of England the consent of parties is not a ground of divorce;" but the kind of collusion or conspiracy, which we are commenting on, amounts to exactly the same thing in substance with the case now put.

Now, it appears that one remedy alone can remove the defect which exists, and give the needful protection to the court. The attorney-general, or other representative of the public interest, ought to be a party in all cases of divorce *à vincula*. We have the precedent to guide us of the patent extension proceedings in the judicial committee. No application for an extension of a patent is disposed of, unless the public interest is represented by the attorney-general, or some one holding his brief. But for this security to the public at large, the patentee might buy off the opposition of one or two parties, and obtain an extension of his exclusive right, to the detriment of all others. It is, however, much more difficult for the divorce court to detect conspiracy, than for the judicial committee to sift the case of the patentee, because the main points are before it; the merits of the invention, and the profits already made from the monopoly. It is no doubt certain, that even with the attorney-general to watch the divorce case, much might be concealed, and often the conspiracy might succeed. But still, in many cases it would fail; because, whoever was aware of any fact fatal to the suit, would be able to give information to those who instruct the attorney-general; and upon that information he could act, both by obtaining further evidence and by bringing it before the court. At present there is no quarter to which information of this description can be given. Thus, in the cases above put, if some member of the family, whose heads are in league to dissolve their marriage, happens to have become possessed either of evidence of declarations, or of letters, receipts, or other documents proving the conspiracy, no possibility exists of this reaching the court; and yet, if brought to its knowledge, the whole suit must fail. No more need be said to show both the defect which exists, and the easy manner of curing it. The sanctity of the marriage tie, and the necessity of preventing manifest frauds, to the scandal of the administration of justice, seems alike to require that this subject should be considered by the legislature.

The letter from Lord Brougham, which has drawn our attention now to this topic, and which was laid before the Law Amendment Society, is as follows :—

“It appears to me very expedient to lay before the Law Amendment Society a defect in the important act passed last year, the 20th and 21st of the Queen, cap. 83, establishing the Divorce and Matrimonial Causes’ Courts. No sufficient security is provided, hardly any security at all, against the frauds which may be practised by parties acting in collusion to obtain a divorce. The court is entirely at their mercy, and unless by some accidental slip of the parties, or their professional representatives, the conspiracy is sure to succeed. When the marriage could only be dissolved by act of parliament it was otherwise ; for although the House of Lords was occasionally imposed upon, yet in many cases the contrivances of the parties failed, in consequence of the communication which could be had with members of the House much more freely, indeed with fearless irregularity, than can be held with judges. I have known many instances of important suggestions made to peers, either by their brethren in the House, who had their attention called from general report, or things that came to their knowledge not in their legislative capacity. I recollect Lord Tenterden calling my attention to what seemed to him suspicious circumstances in a divorce case, his suspicion having been roused by something he had heard on circuit. Those who with me disposed of that case, found that his suspicions were well-founded. I have known more than one divorce bill thrown out by the law lords sifting the evidence in consequence of information which had reached them, and which gave rise to strong suspicion, nothing of which could ever have been suspected from any part of the evidence as it was left by the parties at the bar. In none of these cases did the House exercise its rights of examining the parties, a right which the Act gives the new court ; but which the result of my experience, while sitting on divorce bills, leads me to consider most ineffectual security against the frauds of parties, if it were resorted to.

“There are two kinds of collusions, one from the mere common purpose of the parties, who being, in the great majority of

cases, equally desirous of divorce, make almost all such cases really undefended ; the other, when there has been such connivance as shews that the offence was committed with the design of causing a dissolution of the marriage. This last kind of collusion is, of course, in all cases fatal to the suit for divorce ; but the other, though much less criminal, may yet be sufficient to frustrate the object of the parties. But the court, in exercising the very high jurisdiction conferred upon it, ought to be possessed of all the particulars which can have any influence upon its exercise of the sound discretion with which it is intrusted. As the law now stands, and the practice of the court under that law, there can be nothing more helpless than its position. It cannot conveniently, perhaps not effectually, cross-examine the witnesses produced ; and, whatever suspicions may have been roused by some accident in the course of the trial, it cannot bring forward witnesses whom the parties have not called. There is nothing in the act that even resembles a provision for the protection of the court against the conspiracy of parties, excepting the power of adjourning the case, and to require further evidence when it is not satisfied. But how is it to learn the circumstances of a suspicious kind when the parties conceal them ? and of what use is the adjournment of the case unless suspicion has been excited ? It seems that the only chance of protection to the court is the requiring the attorney-general, or some one representing him, to be made a party in all such cases. This has been done under the act giving the judicial committee power to extend patent rights ; and it is for the protection of the public, and to prevent a patentee who has bought off his opponent from thus obtaining an extension of his monopoly at the expense of the public. There seems every ground for giving a like protection to the high interests of the community, its interests in preserving the sanctity of the marriage tie, preventing the injury to morals which must accrue from granting divorces as the fruit of conspiracy. The whole subject seems to me well worthy of the Society's attention ; and from what occurred during the progress of the bill of 1857, in both Houses, I should think the adversaries of that important measure would be inclined rather to favour than to oppose some such provision as I am now suggesting. I threw out this proposal in one of its stages in our House, but I have no

distinct recollection of any discussion arising upon it. I have written to Sir R. Bethell upon the subject, as well as to some friends on the bench, and I have every reason to believe that, at all events, they will be inclined to approve of the subject undergoing a full discussion among professional men.—Yours, &c.

“BROUGHAM.”

It is clear that the mischief above referred to, as well as certain other matters connected with the constitution of the court in question, and which experience has demonstrated require consideration, ought to form the subject of amendment during the ensuing session. Thus the business of the court, notwithstanding its vigorous despatch by the eminent judge-ordinary, is grievously retarded from causes referred to elsewhere. There are other points, also, which probably will have been duly suggested to the government authorities, and which involve certain minor defects discovered in practice, but to which we need not here refer.

It is desirable to have the necessary and appropriate remedies for all the ascertained imperfections applied at once, and in one sufficient measure. We may congratulate ourselves that it is only with these points of detail which we have now to deal; we are not now fighting the battle of principles, or storming the strongholds of vested interests, in order to establish a rational procedure and competent courts. It is, however, curious that in Prussia, a country which was wont to be cited by some as our model in matters matrimonial, an agitation is now being raised for the purpose of reforming their laws relating to divorce. The ecclesiastical party are endeavouring to restrict the remedy of divorce to those cases in which alone they conceive they have been so fortunate as to discover, and are now revealing, that it is the perfect will of God it should be permitted. Nevertheless it does not seem that the churchmen in Prussia are carrying great weight on the question, nor that it is being very rationally discussed. The task open to the English legislature is much more hopeful. It is to make the present court work still more efficiently and irreproachably than it now does.

Notes of Recent Leading Cases.

[NOTE.—It has been thought advisable to modify the form in which the "Selection of Adjudged Points" has heretofore appeared in this portion of the Magazine. The change has been often suggested, especially on the ground of the length of time which elapses between the appearance of Reports and the quarterly numbers of this periodical. It is, nevertheless, desirable to reserve a space in our pages for the purpose of exemplifying the particular nature of certain judgments, and of tracing the course which is taken, from time to time, by the decisions of Courts of Law and Equity. We have therefore, with this view, adopted the present plan.]

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1. *ROLT v. HOPKINSON*. 28 L. J. Chanc., 41.
Mortgage—Further Advances—Priority—Gordon v. Graham (2 Eq. Ca. Abr., 598, S. C. 7 Vin. Abr. 52, E. 3) overruled.

In the case of *Gordon v. Graham*, decided by Lord Cowper, nearly a century and a half ago, a mortgagor mortgaged an estate to a mortgagee for a term to secure a sum of money already lent, and further advances, and then mortgaged the same estate to a second mortgagee for a certain sum, the second mortgagee having, at the time of his mortgage, notice of the first

mortgage. The first mortgagee, after having had notice of the second mortgage, made further advances to the mortgagor. Lord Cowper held, that the second mortgagee should not redeem the first mortgage without paying as well the money lent after as that lent before the second mortgage was made; for it was the folly of the second mortgagee with notice, to take such security. The report then goes on to say, that "upon the importunity of the counsel, it was ordered that the master should report what money was lent to the first mortgagee after he had notice of the second mortgage." The following extract from the order may serve to explain the case, the report of which, both in *Eq. Ca. Abr.*, and in *Vin. Abr.*, is meagre in the extreme—"It is by the consent of the defendant Graham ordered and decreed, that the said estate, by him purchased of the said Sir Richard Hutchinson, be sold to the best purchaser, &c., and out of the money arising by such sale, the defendant Turner is to be paid his debt in the first place; and for that purpose the said master is to see what is due to him as advanced or lent on the credit of the said mortgage; and if he shall find any monies advanced by the said Turner on the credit of the said mortgage, after the 25th of August, 1713, he is to state the same specially; and the said master is to tax the defendant Turner his costs of this suit; and after the defendant Turner shall be satisfied what shall be so certified due to him for principal, interest, and costs, then the defendant Montgomery is in the next place to be paid his principal sum of £900, with interest, together with his costs of this suit, to be computed and taxed by the said master out of the said money arising by such sale of the premises," &c.—(R. L. 1715, A. fo. 341.)

Lord St. Leonards has said (2 Dr. & W., 431) that it deserved further consideration whether it would be safe in all cases to rely upon Lord Cowper's decision as an authority that advances may be safely made after the first mortgagee had notice of a second mortgage; and in the recent case of *Shaw v. Neale* (6 H. L. Cas., 597) the learned lord remarked, that "if Lord Cowper had in the end maintained the opinion he was at first supposed to express, he could not have made the order of reference to the master which is found in that case."

Lord Chancellor Chelmsford, in his judgment in *Rolt v. Hopkinson*, observed that he had been unable, by tracing the case of *Gordon v. Graham* to its final result in the registrar's books, to arrive at any satisfactory conclusion respecting the mode in which Lord Cowper ultimately dealt with the advances made after notice of the subsequent mortgage. The decree for the master to report appeared to his lordship to be completely irreconcilable with the strong opinion attributed to Lord

Cowper; for although he certainly directed that the first mortgagee should be paid what was due to him for principal and interest, yet if he was of opinion that the first mortgagee was entitled to every thing which he advanced, it appears to have been wholly unnecessary to have directed an inquiry as to any monies advanced by Turner on the credit of the mortgage after the 25th August, 1713, upon which, if the master found there were any such subsequent advances, he was to state the same specially. The fate of this case, said the Lord Chancellor, has been singularly unfortunate; it has never been followed as an authority; it has frequently been questioned by text-writers, and whenever it has been cited in argument, it has elicited some expression of disapprobation from the judges.

We know of but one eminent text-writer who has not doubted the soundness of Lord Cowper's decision; we allude to Mr. Jarman, whose opinion seems to have been that the decision was a just one.—(5 Byth. & Jar. Conv., by Sweet, 443.)

The facts in the case of *Rolt v. Hopkinson*, upon which the substantial point for decision arose, were almost similar to those in *Gordon v. Graham*, and were as follows:—Mr. Mare, the shipbuilder, executed a mortgage, dated 26th January, 1855, to the Commercial Bank, to secure sums due or to become due by Mr. Mare to the Bank. He then executed a mortgage, dated 12th February, 1855, of the same property to Mr. Peter Rolt, to secure sums which Mr. Rolt then was, and thereafter might become, liable to pay for, or on account of Mr. Mare. Mr. Rolt had notice of the mortgage to the Commercial Bank before the mortgage to him was executed. The Commercial Bank, with full notice of the second mortgage, and subsequent to the date thereof, advanced further sums to Mr. Mare. The question was, whether, under this state of circumstances, the Bank was entitled to priority as to these advances over antecedent payments made by Mr. Rolt on behalf of Mr. Mare? It was suggested in the course of the argument before the Lord Chancellor, that there might be a difference between the case of *Gordon v. Graham* and the present case, because in the former there was a sum actually advanced by the first mortgagee, but that here nothing was due (as it appears) at the time of the mortgage, which was a covering security merely for advances in future. The Lord Chancellor, however, confessed that he was unable to appreciate this difference, which certainly seems to be somewhat far-fetched.

The case was heard by the Master of the Rolls in May last (see 6 W. R., 590). That learned judge, in *Shaw v. Neale* (20 Beav., 182), observed that the case of *Gordon v. Graham* had never to his knowledge been treated as an authority for holding that the

doctrine there laid down applied to the case of a second encumbrancer, who advanced his money *without* notice of the first mortgage; his honour, in his judgment in the present case, remarked that what was material was not whether the second mortgagee had notice of the first security, but whether the first had notice of the second mortgage when he made his further advances. It would be impossible, said the Master of the Rolls, without drawing distinctions without any valid foundation, to say that the second mortgagee should take priority over further advances by the first, if he advanced his money without notice of the first deed, but that he should not do so if he had notice of it: and accordingly the Master of the Rolls held, that the bank was not entitled to priority, as to the subsequent advances above referred to.

From this decision the defendant (who represented the Bank) appealed. The Lord Chancellor observed that the case of *Gordon v. Graham* had been repeatedly shaken by side-winds, and must have its foundation examined; for if the opinion of Lord Cowper was right, then the decision of the Master of the Rolls was wrong. The reason given by Lord Cowper for giving priority to advances made by the first mortgagee, after a second mortgage, though he had notice of it, is, because it was the folly of the second mortgagee with notice to take such a security. "But," proceeds the Lord Chancellor, almost in the same words as those used by Mr. Coventry (Pow. Mort., 534, note), "this is a two-edged reason which reaches to the first as well as to the second mortgagee; for it may as well be said to have been the folly of the first mortgagee to hazard further advances after notice of the subsequent encumbrance." The case supposed in the course of the argument by the defendant's counsel, of a second mortgagee depriving the first mortgagee of the benefit of the security for future advances, would not, said the Lord Chancellor, necessarily arise, because advances might have been made by the first mortgagee before the execution of the second mortgage, even to the utmost limit of amount. The Lord Chancellor concluded as follows:—"If the case of *Gordon v. Graham* were to be followed as an authority, then the moment a covering security for future advances was made, it would preclude the possibility of the mortgagor being able to raise money from any other person, because the claim of a second mortgagee, under such circumstances, would be indefinitely postponed, according to the fluctuating nature of the balance under the prior mortgage. For these reasons I am not disposed to consider *Gordon v. Graham* as an authority by which I ought to be bound; but I am of opinion that in this case the plaintiff is entitled to priority for his advances made

before the advances made by the Commercial Bank, with full knowledge of the plaintiff's security." Mr. Fisher's excellent remarks on this subject, in his work on the law of mortgage, appear to have been adopted by the Lord Chancellor. Mr. Fisher says (p. 363):—"It may be urged that the doctrine (in *Gordon v. Graham*) amounts to a perpetual curb on the mortgagor's right to encumber the equity of redemption. And it seems contrary to the general principles of equity that a mortgagee should, by thus taking a security for advances which may never be made, put a pressure on the mortgagor by taking away his power of raising money from other persons. The first mortgagee is never bound by such a clause to make further advances at the mortgagee's pleasure; and if he do so, after notice of a *mesne* encumbrance, it seems that it should be at his own risk."

We are inclined to think that this being the rational view of the subject, the law, as it is now left by the present Lord Chancellor's confirmation of the judgment of the Master of the Rolls, is in principle the sound one, and will be found the best practical settlement on the right foundation of a question which for years has been a stumbling-block and an offence in our courts of justice.

2. *PEACOCK v. PEACOCK*. (1 Swa. and Trist., 182—27 L. 771. Prob. and Mat. Court, 86.)

BOSTOCK v. BOSTOCK. 1 Swa. and Trist., 221.

Condonation—Cruelty.

IN *Peacock v. Peacock*, the judge-ordinary, in his summing up to the jury, thus defined and explained condonation. He said, condonation is "forgiveness of a conjugal offence with full knowledge of all the circumstances, and is, in my opinion, a question of fact for the jury, and not one of law. I wish my opinion to be known, that, if wrong, I may be better instructed by a higher court. It is for the court to direct the jury what will constitute condonation; and for the jury to determine whether, subject to that direction, the circumstances of the particular case amount to condonation. If a woman, having full knowledge that her husband has committed adultery, continues still to live with him, you would be justified in inferring that she had pardoned the offence. The question for your consideration is, did the petitioner pardon her husband's adultery?"

It has been laid down by Lord Stowell in *D'Aguilar v. D'Aguilar* (1 Hag. Ec. Sup., 482), and Sir C. Cresswell has in *Curtis v. Curtis* (27 L. J., 72) concurred, that "all con-

donations by operation of law are expressly or impliedly *conditional*, for the effect is taken off by repetition of misconduct. Condonation is *not* an absolute and unconditional forgiveness."

Thus in *Bostock v. Bostock*, in regard to condonation of cruelty, the judge, in accordance with the above principle, ruled, "that when there have been acts of violence followed by condonation, *threats subsequently* uttered, if of such a nature and so expressed as to satisfy the court that further cohabitation would be attended with danger to the party threatened, constitute sufficient ground for a decree of judicial separation."

3. ADAMS v. LLOYD. 3 H. & N., 351, and 27 L. J. Exch., 499.

Interrogatories at Common Law—Com. Law Proc. Act, 1854, sects. 51-54.

We revert to this case on account of its practical importance. It arose out of the construction of the 51st section of the Common Law Procedure Act, 1854. This clause having given to either party to an action at law a right to deliver to the other side interrogatories in writing upon any matters "as to which discovery may be sought," it has been frequently a subject of doubt as to the limits within which the provisions in question should be applied. Although various points have been determined in the Queen's Bench by the cases of *Whately v. Crawford*, *Carew v. Davis*, *Scott v. Zygomala* (*vide* 4 E. & B., 483), and in the Exchequer by *Osborn v. London Dock Company* (10 Exch., 698), *Master v. Hemming* (Id. 478), and several others referred to in the course of the argument and judgments in these cases; yet the principle as well as the practice with regard to interrogatories remain at present on an unsatisfactory footing.

The case of *Adams v. Lloyd*, then, came before the court on a rule being moved for to shew cause why an oral examination of the plaintiff should not be directed, or why the plaintiff should not file a better answer to the interrogatories which had been addressed to him; and the point was raised on the question as to right of the defendant to work mines under plaintiff's land, which was thereby injured. The defendant exhibited interrogatories, inquiring generally and particularly if the plaintiff had in his possession or control any deeds relating to the land; and if so, their number, date, and the parties thereto. To which plaintiff thus replied: "I have in my possession, custody, and control, divers deeds and writings relating to the lands mentioned in the first and second counts of the declaration delivered in this cause; but I abstain from stating the number thereof, the dates thereof,

and the parties thereto; being advised that I am not bound, and that the defendants have no right to call upon me, to state the same, and being also advised that the first interrogatory itself is immaterial and irrelevant, and merely fishing, and is otherwise objectionable in point of law; and I humbly submit that I am not bound to make any further answer thereto."

It appeared that what the defendant sought was not an inspection of the deeds, but a schedule of the dates and names, &c., of them, according to the practice in equity when answering a bill of discovery; and he sought especially to find out whether the plaintiff derived his title through a particular person whom he named. In other words, it was required that the plaintiff should *describe* his title-deeds, that the defendant might decide if his title was made out by them.

In the recent case, however, of *Adams v. Lloyd*, one important branch of this topic underwent consideration, and Watson (B.) observed, "that he hoped it would be a leading case upon the subject." On this account, therefore, we have particularly adverted to it. It will be also remembered that the late vice-chancellor, Shadwell, in his evidence before the Chancery Commission, affirmed, "that the preparation of interrogatories was the most difficult thing counsel had to do;" and the subject of discovery has been of sufficient importance to find employment for the able pens of Sir James Wigram and Mr. Hare.

The case of *Reynell v. Sprye* (1 De G., M., & G., 660), being an authority cited in the course of the arguments, as expounding and maintaining important points in the practice which subsists in equity in relation to interrogatories, the court laid it down that the principles adopted as common law are in harmony with those of courts of equity; and Watson, B., thus stated the rule which should determine the rule of mutual interrogation:—"When a person is interrogated as to whether he has any thing material in his title-deeds to assist the adversary's case, he has a right to answer—I have deeds in my possession, but they do not relate to your title. He is, first of all, to say whether he is in possession of title-deeds or not. If he says he has none, there is an end of the case. If he says he has title-deeds, then he may be asked whether he has any thing which shows the title to be in the applicant, and which is evidence of his title. That is the utmost extent to which it can be carried; and when he answers in that way, and says that he has his own title-deeds, which relate exclusively to his own title to the land, you can go no further." Hence no indirect modes of getting at the title-deeds of an adversary are sanctioned by such a law in equity. A man holding his own title-deeds, when asked to disclose particulars

about them, may reply, as Pollock (C. B.) observes—"I have no documents which you have a right to see. I will not tell you all the documents I have; it would be injurious to me. You have no right to know the penury of my iron chest; you have no right to know how little parchment I have to sustain my right to the position I hold; and you have no right to know what other documents that do not belong to me have got into my possession, unless they belong to you; but I swear that I have no document that has any tendency, directly or indirectly, to advance your case." The rules relating to discovery are well established in courts of equity, although, no doubt, difficulties occur in applying these as every other rules which concern mutual and complicated relations of litigants; and *Adams v. Lloyd* results in declaring, that the practice under the C. L. procedure statute is henceforth to be pursued, in obedience to the principles recognised and acted on in courts of equity.

4. BARNETT V. ALLEN. 3 H. & N., 376.

Slander—Interpretation of Slang—Query, whether "Blackleg" is English or slang.

The above case may be referred to as affording an example of the difference of opinion, which sometimes strangely occurs in our courts, upon what seems a very simple matter. The action was brought for the following words of slander, spoken by defendant: "I am surprised Mr. Reynolds should allow a blackleg" (meaning the plaintiff) "in this room," (meaning that the plaintiff obtained his living by dishonest gambling, and was a professed gamester, and a fraudulent gamester.) A witness was asked what he understood by the term "blackleg." The question was objected to, but allowed; and the reply was to the effect that it involved the charge of cheating in the process of card-playing. Pollock, C. B., said, that the meaning of the word was well enough known by the public, and it required no expert to explain it. It signified, said the learned judge, "a person who gets his living by frequenting race-courses, and places where games of chance are played, getting the best odds and giving the least he can, *but not necessarily cheating*. That is not indictable either by statute or at common law." Watson B. agreed in the main with the Chief Baron. Martin B. and Bramwell B., however, put the point so clearly and conclusively, that as room was made for variance in the apprehension of such a question, it is well to note their remarks thereon. "I regret," said the former learned judge, "that any difference should exist in the court on so trifling a matter. I always understood the rule to be, that words are actionable if

they impute to the person of whom they are spoken an indictable offence, either on a particular occasion or habitually. By the stat. 8 and 9 Vict., c. 109, cheating at cards is indictable, and the question is, did or did not the defendant use the word with the intention of conveying to the minds of the persons present the imputation that the plaintiff had habitually by fraud and malpractice won money. I should so have understood them, and that such was the defendant's meaning was proved by the evidence. The witness who was called said he considered the word 'blackleg' to mean a person who plays at cards and cheats; it was therefore a question for the jury, whether the defendant meant to impute to the plaintiff, that he had been guilty of an offence for which he was liable to be indicted under the statute."

Bramwell, B., agreed in this construction of the term. "A person," said the learned judge, "is responsible for the natural meaning of words uttered by him. If a word is properly an English word, the judge must interpret it. If it be slang, witnesses may be called to show in what sense it is understood. I doubt whether the word 'blackleg' is English, or whether it is slang. If it is English, then I understand it as my brother Martin does; if it is slang, an interpretation has been put upon it by the evidence. I do not agree with the Lord C. B. in thinking that there was no evidence of its meaning. If it is English the innuendo was unnecessary—if it is slang that innuendo was proved; that is, the defendant uttered language charging the plaintiff with being a fraudulent gamester. I entertained some little doubt whether, to constitute a cause of action, it was not necessary that the charge should be specific; but, on referring to Comyn's Digest, action on the case for defamation, D. 4, I find that it is actionable if the defendant charge the plaintiff 'with felony generally, as, he is a thief.'"

5. CROFT v. LUMLEY.—In the Queen's Bench, 5 El. & Bl., 648; In the Exchequer Chamber, 5 El. & Bl., 682; In the House of Lords, 6 H. L. Cases, 672.

Lease—Covenants—Condition of Re-entry—Charge—Forfeiture—Waiver.

By an indenture of lease, dated July 10, 1845, the Opera-house in the Haymarket was demised by Faithful Croft, the plaintiff, to Benjamin Lumley, the defendant, as to part for sixty-six years, from Sept. 29, 1825, and as to the other part, for fifty-one years, from Sept. 29, 1840. The lease contained a covenant on the part of the lessee for payment of rent quarterly, and various other covenants, to one only of which we need particularly

refer, namely—a covenant not to charge or encumber the theatre, or the income thereof, or the terms granted by the lease, or either of them, by mortgaging the same, or granting any rent, charges, or any other encumbrance or encumbrances whatsoever. The lease also contained a condition of re-entry on default in payment of rent, or on breach of certain specified covenants, or on default “of or in the performance of all or any of the other covenants, grants, articles, conditions, and agreements, therein before contained,” which, on the part of the lessee, were to be performed, observed, and kept. Under this condition an action of ejectment was brought against the defendant, Lumley, for alleged breaches of, amongst others, the covenant against charging or encumbering the theatre; and a verdict for the plaintiff was taken by consent, subject to a special case stated for the opinion of the Court of Queen’s Bench. The case stated that the court was to have power to draw the same inferences of fact as a jury. There were several points raised on this case, but we purpose to select only such of them as appear to be of sufficient interest to warrant notice in these pages.

The covenant against charging or encumbering the theatre was not one of the covenants specified in the condition of re-entry, and the portion of the condition which we have inserted between inverted commas was the only portion which could apply to that covenant. One of the points raised was, whether, admitting that a breach of that covenant had been committed, the condition of re-entry would at all apply to such breach—that is, whether default in *performance* of covenants was applicable to covenants *not* to do something, as well as to covenants to do something. The Court of Queen’s Bench expressed a clear opinion that it did, and the judges (Channell, Watson, Bramwell, and Martin, B. B., and Crompton, Williams, Erle, Wightman, and Coleridge, J. J.), who, when the case was carried up to the House of Lords, were called in to assist the House, were all of the like opinion. Mr. Baron Martin, indeed, went so far as to say, that he did not consider there was “any inaccuracy in language in saying that a man has performed his covenant when he has not done what he covenanted not to do, or that he made default in performing his covenant when he has done it.” The question was not one which rendered its determination by the Court of Exchequer Chamber, or the House of Lords, necessary for the decision of the case. Lord Wensleydale, however, expressed his concurrence with the opinions of the judges on that point.

The point we shall next notice was one of much greater difficulty, and one upon which there was not an unanimity of opinion. Several warrants of attorney, all of which, it was admitted,

were *bonâ fide*, and given for good consideration, were, after the date of the lease, granted by Lumley to one Hughes. Among them was a warrant, dated October 6, 1852, the defeazance to which we shall shortly abstract. After reciting that, by an indenture dated 1st August then last, between Lumley of the first part, one Bacher of the second part, Hughes of the third part, and an immaterial party of the fourth part, in consideration of £2210 then due to Hughes, and of the payment by Hughes to Lumley and Bacher, at the time of the execution of the indenture, of £290, Lumley and Bacher had entered into joint and several covenants with Hughes for payment to him of the aggregate sum of £2500 with interest, and that in the same indenture were contained certain securities, by way of mortgage, for payment of the said sum of £2500 and interest, and that it was intended that that warrant of attorney should have been executed concurrently with the said indenture, but the same had been delayed until that day; it was agreed, that the therein within written warrant was given, and judgment to be entered up by virtue thereof, was intended as a concurrent security with the indenture of 1st August then last, for securing to Hughes the payment of the said sum of £290 and interest, on the 1st February then next, and that judgment should forthwith, or at such time thereafter as Hughes should think fit, be entered up under the authority of the said warrant, and be registered, but no execution should be issued until default in payment of the said sum of £290, and interest, should be made. On the 20th day of October, 1852, judgment was signed on this warrant, and registered by Hughes in the Common Pleas Registry, and on September 20, 1853, was registered in the Middlesex Registry.

The case set out several of the other warrants of attorney, but they are not set out in the report. One of them dated November 2, 1852, was referred to, as will presently appear, by the Court of Exchequer Chamber, and by some of the judges in the House of Lords, and from a note (5 El. and Bl., 655) and some of the judgments, it appears that the defeazance to that warrant stated that it was "intended as a collateral security," with a recited indenture, "for further securing" the payment of a sum of £1400, and that judgment should be entered up "and be registered," and that the creditor might *forthwith* issue execution.

It appeared on the case, that in the month of August, 1852, Hughes first became aware that Lumley was lessee of the Opera-house, and that he was aware, when he made the several advances, that Lumley was the owner of a house at Fulham, and a house in Pall-Mall, both in Middlesex.

Lumley also consented to several judge's orders to sign judgment in *bonâ fide* actions brought against him by various persons for debts really due, but not until after issue joined, and, in most cases, not until after the actions were set down for trial; and it was admitted that Lumley consented to such orders in order to save expense, and because he had no defence to the actions.

The question raised on this state of facts was, whether the granting of such warrants, and the consenting to such orders, constituted breaches of the covenant against charging or encumbering the theatre? The Court of Queen's Bench held that they did, the Court of Exchequer Chamber that they did not—and this last view was confirmed by the House of Lords. The warrant of the 6th Oct., 1852, an abstract of the defeazance to which we have given above, made the strongest case for the plaintiff. Mr. Baron Channell said that, if Lumley did charge the theatre at all by warrant of attorney, it was by that warrant, and if not by that, then not by any other.

Lord Campbell, in delivering the judgment of the Court of Queen's Bench,¹ said that the mere grant of a warrant of attorney to secure a just debt, or the consent to a judge's order to sign judgment in a *bonâ fide* action to which there was no defence, would be no breach of the covenant in question, although it might lead eventually to the lease being taken in execution; but the court was of opinion that it had been broken by what Mr. Lumley had done and caused to be done, amounting to a positive, direct, and actual charge and encumbrance upon the theatre. His lordship, after stating that, among the numerous warrants of attorney, it would only be necessary to refer to that dated the 6th Oct., 1852, and that the warrant, in so far as it authorized the attorneys named in it to appear and confess, &c., was in the usual form, said, that the defeazance shewed a purpose that that should be done by Lumley's own authority, which amounted to a charge or encumbrance within the meaning of the covenant. After giving the substance of the defeazance, and stating the several facts we have mentioned above, the Lord Chief-Justice proceeded as follows:—"Now, having regard to these facts, and to the 13th sec. of 1 & 2 Vic., c. 110, it is quite clear that Lumley's

¹ Lord Campbell, C. J., Coleridge and Wightman, J. J. In the report (5 EL. & BL., 667), it is stated that the case was argued before these judges and Mr. Justice Erle. But certainly Mr. Justice Erle did not concur in the judgment of the court; for, in the House of Lords, his opinion was diametrically opposed to that of the Court of Queen's Bench on this point, and he did not state that he had *changed* his opinion since the judgment of that court had been given. In the report of this case in the *Law Journal* (25 L. J. Q. B., 80) it is said that Mr. Justice Erle heard only a part of the argument in the Queen's Bench.

interest in the Opera-house, under the lease from the plaintiff, was actually charged, and that Hughes, the judgment creditor, had such and the same remedies in a court of equity against the property so charged as he would be entitled to in case Lumley had, by writing under his hand, agreed to charge the same with the amount of such judgment debt and interest thereon. It seems equally clear that such was the intention of Lumley when he executed the warrant of attorney. He must be taken to have been aware of the statute, and to have intended the necessary consequence of his own act."

The Court of Exchequer Chamber, on the other hand, thought that the case was to be governed by *Doe d. Mitchinson v. Carter* (8 Term Rep., 57). In that case a lessee, holding under a lease containing a covenant on his part not to let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture of lease, or the messuage thereby demised, and also a proviso for re-entry by the lessor in any such case, gave a creditor a warrant of attorney to confess judgment, upon which a judgment was entered up, execution issued, and the lease was sold; and yet the lease was held not to have been forfeited. Lord Kenyon, in the course of his judgment, remarked: "I adopt the distinction, relied upon by counsel, between those acts that the party does voluntarily, and those that pass *in invitum*; judgments in contemplation of law always pass *in invitum*, and I see no difference between a judgment that is obtained in consequence of an action resisted, and a judgment that is signed under a warrant of attorney, since the latter is merely to shorten the process, and to lessen the expense of the proceedings. If the warrant of attorney itself had been a specific lien on the estate, that perhaps would have come within the words of this covenant; but it only gave the creditor power to enter up judgment against the tenant, and, *non constat*, that it would be followed up by the term being taken in execution under that judgment." Lawrence (J.) said—"If it had been stated that the warrant of attorney was given for the express purpose of having the term taken from the tenant, it would have been a forfeiture of the lease; but the mere giving of a warrant of attorney does not imply that such was the tenant's object—it might as well be argued that the giving of a bond which might lead to a judgment and execution, on which the term may be taken, was a forfeiture."

In another case (8 T. Rep., 300), similar to, and between the same parties as the last, with the addition that the warrant of attorney was executed for the *express purpose* of getting possession of the lease, it was held that the lease had been forfeited. Lord Kenyon thus distinguished between the two cases:—"When

the former question arose, the court, to a certain degree, relaxed the severity of the covenant, and they then said there was no forfeiture, because all that was stated was, that a fair creditor had used due diligence to enforce the payment of a just debt, and that the lease was taken from the tenant against his consent, by judgment of law. But when it is now stated that this step was taken for the express purpose of getting possession of the lease, and that the tenant consented to it, it would be ridiculous to suppose that a court of justice could not see through such a flimsy pretext as this. Here the maxim applies:—That that which cannot be done *per directum* shall not be done *per obliquum*. The tenant could not by any assignment, under-lease or mortgage, have conveyed his interest to a creditor, and consequently he cannot convey it by an attempt of this kind. If the lease had been taken by the creditor under an adverse judgment, the tenant not consenting, it would not have been a forfeiture; but here the tenant concurred throughout, and the whole transaction was performed for the very purpose of enabling the tenant to convey his term to the creditor.”

If the effect of judgments on chattels real had been the same after the statute 1 & 2 Vict., 110, as it was before that statute, there would, of course, have been no doubt that the case of *Croft v. Lumley* would, as regards the point now under consideration, have fallen directly under one or other of the decisions in *Doe v. Carter*; but it must not be forgotten that, before the statute, chattels real were not bound until the writ of execution was delivered to the sheriff, whereas, under the 13th section of the statute, a judgment entered up operates now as a charge upon the chattels real of the debtor.

The Court of Exchequer Chamber,¹ however, did not think that, in the present case, the statute made any difference. “We think,” said Alderson, B., in delivering the judgment of the court, “this case is to be governed by the principles laid down by the Court of Queen’s Bench in *Doe v. Carter*. . . . The debts [in the present case] were undisputed, and the warrants of attorney were merely given to save time and to lessen expense. The greater effect given to such judgments by the 13th section of the 1 & 2 Vict., c. 110, does not seem to us to make any difference. The covenant here is against voluntary acts of mortgaging or encumbering on the part of the lessee. To incur the debts was not such an act. All the same consequences if the suit had been adverse would have followed from these debts alone. . . . But it is said that here, at all events, in the warrant of attorney of November 2nd, the object of the granting it is stated to be

¹ Cresswell, Williams, Crowder, JJ., Alderson, Martin, BB.

the giving thereby a collateral security for the debt, and the registration of the judgment is expressly mentioned and provided for therein, and that this brings the case within the rule laid down in *Doe v. Carter*, when tried a second time. But we think not; for in that case it was expressly proved that the intention of the parties was to assign the lease, and the mode of doing so by means of a warrant of attorney was resorted to, in fraud of the covenant in the lease. There is no such pretence here."

Of the judges who delivered their opinions in the House of Lords, Channell, Watson, Bramwell, and Martin, BB., and Williams and Erle, JJ., agreed with the judgment of the Court of Exchequer Chamber on this point; and two, namely, Crompton and Wightman, JJ., agreed with that of the Court of Queen's Bench; Mr. Justice Coleridge, who had concurred in that judgment, now upon reflection changed his opinion, and agreed with the majority of the judges. Our space will not admit of a particular notice of the opinions of all the judges on this point, and we shall therefore extract only a few passages from the opinions of the two judges who differed from the majority of their brethren, and a few passages from the opinion of Mr. Justice Coleridge, who had found reason to change his former opinion.

Mr. Justice Crompton said, that the warrant of Oct. 6th was expressly given as a concurrent security with the indenture of Aug. 1st. "It is not the giving [of] an earlier judgment in an adverse action, nor even giving a security for an old debt, if that would have made any difference, but the judgment according to the terms of a previous negotiation is expressly given, and is to be registered as a concurrent security for the advance of money. The lessee gives the warrant with the expressed and avowed object of the judgment being registered against him as a security for the money advanced. It is a security, and the money is secured thereby, and charged upon the subject-matter of the security. The provisions for registration shew that it was contemplated that lands should be part of the subject-matter of this security; and at all events, the security, when acted upon according to the expressed intention of the parties, would form a charge or encumbrance on the land. . . . It is said that, until the judgment was signed, there was no such encumbrance; and that the signing [of] the judgment was the act of the creditor and not of the lessee; and that it might have happened that the party died, and that no judgment could have been signed. It is quite true that there would have been no encumbrance and no breach of the covenant, if judgment had not been signed, from death or any other reason; but the question is, whether the signing of the judgment was not really the act of the party giving the warrant,

with the intention that it should be used for a security, and should not be enforced by execution immediately. It seems to me that the acting on the warrant and signing the judgment is, for the present purpose, the act of the giver of the security, just as much as the giving a warrant of attorney may be, if such was the intention of the giver, the causing his goods to be taken in execution under the Bankrupt Act. . . . Suppose, instead of the covenant against doing an act by way of encumbrance, the covenant in a conveyance of the land had been, that he had done no act to charge or encumber the lands, and it had afterwards appeared that the covenantor had suffered a judgment on purpose to bind the lands in question, could it be doubted that the covenantee might maintain an action for damages sustained in consequence of such judgment? . . . In the present case, I would ask, first, was this property, with the lessee's other landed property, encumbered or charged by this judgment? and, secondly, was it so encumbered or charged by his direct authority, given for the very purpose of creating such a charge or encumbrance on his landed property as security for the money advanced? I think that the answer must be, that it was so charged or encumbered, and by his authority, given for that express purpose, so that the act of encumbering or charging is really his."

Mr. Justice Wightman, after referring to the warrant of November 2nd, and the defeazance thereto, said:—"By this warrant of attorney and defeazance, Lumley (the lessee of the theatre) authorized the creditor to enter up judgment forthwith, and issue execution immediately; and as the judgment, when signed, was by his authority and without any action brought, the effect was the same in charging the theatre as if the lessee had directly and in terms granted an encumbrance upon it; and I am, upon the whole, of opinion that, giving a reasonable construction to the term 'grant,' as used by the parties to the lease, Lumley did voluntarily create a charge upon the theatre, which operated as a grant of an encumbrance within the meaning of the covenant."

Mr. Justice Coleridge said:—"Simply to allow judgment to be signed for an admitted debt, is no more to grant an encumbrance on the debtor's property, in the sense of a covenant against such granting, than to contract the debt, and, after a hopeless and unconscientious litigation, to have the judgment pronounced. In both cases the same result must equally have been within the contemplation of the borrower. So, again, to consent that the judgment, when entered up, shall be registered, is in truth to do nothing. Without the consent of the borrower, the lender would have the same power to do the act as with it. Whether he will sign the judgment or not, and, when signed, whether he

will register it or not, depends on the election of the lender; and the only really effective part in this clause of the defeazance, is the restraint upon the lender as to issuing execution on the judgment. In the judgment of the Court of Queen's Bench, in which I certainly concurred, it is said that 'the defeazance shows the purpose, that that should be done by Lumley's authority, which amounts to a charge or encumbrance within the meaning of the covenant.' The *thing to be done* here referred to, is the appearing and confessing an action; but it is admitted just before, that a mere warrant to secure a just debt would be no breach of the covenant, 'though it would lead eventually to the lease being taken in execution.' Upon re-consideration, I think that the difference between an ordinary warrant and the one now in question, is nominal and apparent only. A purpose is expressed which else would be implied, and a permission given which could not be withheld, and which operates nothing; because the law would have conferred the same right, without the concession of the party."

Lords Cranworth and Wensleydale, before whom the case was argued in the Lords, agreed with the majority of the judges. Lord Cranworth said, that it was impossible to state any abstract rule which should govern every case. Where a warrant of attorney was given to secure a *bonâ fide* debt, he did not think it was to be considered as creating a charge within the meaning of the statute. Circumstances might make it amount to a charge, so as to estop the person giving it from denying that it bore that character. His lordship thought *Doe v. Carter* an admirable illustration of this distinction. Lord Wensleydale agreed with the Court of Exchequer Chamber, because this was not a covenant that Lumley would do nothing whereby the estate might be encumbered, but it was a covenant that he would not "charge or encumber the theatre, or the term hereby granted, by mortgaging the same," that was a direct charge; "or by granting any rent-charges," that was also a direct charge; "or by granting any other encumbrance or encumbrances whatsoever." That clearly meant the same as the former words of the same nature, that he would not grant any direct charge or encumbrance. If the terms of the covenant were, that he would do no act whereby the property should become encumbered, then there was no doubt he would be guilty of a breach of the covenant, by giving a warrant of attorney which might cause an encumbrance upon the theatre.

In the case of *Shaw v. Neale* (6 H. L. Cas., 610), Lord Brougham, referring to *Lane v. Horlock* (5 H. L. Cas., 580), said, "the question arose there, as to the effect of a warrant of attorney to confess judgment—whether a warrant of attorney to confess

judgment brought the case within the provisions of the Usury Act, 2 & 3 Vict., c. 37. Although we did not decide that the warrant was no real charge, yet no man can read the report of what fell from my noble and learned friend (Lord Cranworth) and myself upon that occasion, without seeing that we clearly held, that though a judgment would no doubt have been a charge upon the land, yet that a mere warrant to confess judgment did not constitute such a charge."

In some of the opinions on this point, there is one thing which strikes us as somewhat remarkable. We refer to the stress that appears to have been laid upon the fact of the *registration* of the judgments as creating charges on the theatre. Now it would seem that the *charge* is created by the 13th section of the 1 & 2 Vict., c. 110, and that every judgment *entered up*, operates under that section as a charge whether it be registered or not. The registration clauses apparently provide only for the protection of purchasers, mortgagees, and creditors. By registering the judgment, the creditor no doubt adds to his own security; but does he thereby add to the effect of the charge as against the debtor? Might he not proceed in equity, to obtain the benefit of his charge, as against the debtor, without registering the judgment? Mr. Prideaux, in his work on the law of judgments, &c. (4th ed., p. 124), says, "It is to be borne in mind that these provisions in the new acts on the subject of registration, have a particular object in view, and will not affect any judgment as between the principal debtor and creditor and their representatives. If the proper entries have been made, the creditor by judgment cannot be deprived of those rights and priorities which the law allows to a debt of that nature against third parties. If the proper entries have been neglected, the creditor will lose his lien so far as those parties are concerned; but in the former case, as against purchasers without notice, he has only his old remedies; and in the latter, he will be allowed his remedies against purchasers, &c., with notice, in case and so far as the equitable doctrine of notice is not affected by the statutes of Victoria." But we find in this case that Mr. Baron Watson is reported to have said, "The judgment signed in pursuance of the warrant of attorney, may affect a leasehold interest like this two ways; first, by means of an execution, by which the lease might be taken and sold under a writ of *fiery facias*; and secondly, by *registering* the judgment in the proper office, and when *registered* the judgment would become an equitable charge under the statute 1 and 2 Vict., c. 110, s. 13, and by registering a memorial thereof at the Middlesex registry, the judgment would obtain priority over any charges or judgments subsequently regis-

tered at that registry ;" and further, "It by no means follows that the person for whose benefit the warrant of attorney is given, may ever enter up judgment thereon, or if judgment be entered up, that he may *register* the same *so as to charge the lease*." Mr. Baron Bramwell is reported to have said, that it was a fallacy to call the judgment and the registry the necessary consequence of Lumley's own act ; they were not even a consequence, "no more than they would have been of his incurring a debt, which, not being able to pay, caused him to be sued, and so caused a judgment, and so a *registry*, and *so a charge*." Mr. Justice Crompton is reported to have said, "The statute of the 1st Victoria expressly makes the judgment *when registered* a charge as against the judgment debtor, whatever may be its effect as against other parties." Mr. Justice Williams is reported to have said, that the encumbrance was effected not by Lumley's act, "but by the act of the creditor in signing and *registering* the judgment." Mr. Justice Wightman is reported to have said, "The judgments upon the several warrants of attorney mentioned in the case, when entered up *and registered*, have, by the 13th section of the 1 and 2 Vict., c. 110, the same effect as a charge upon the theatre, as if the person against whom the judgment is entered up" had agreed to charge it with the debt, &c. Mr. Justice Coleridge is reported to have said, that the judgment "entered up and registered clearly operated as a charge on the theatre, and on the terms under the 1 and 2 Vict., c. 110, ss. 13 and 19." Lords Cranworth and Wensleydale, and Mr. Baron Martin, however, do not lay any stress on the fact of registration, the two latter, moreover, refer to the charges as taking effect upon the judgments being entered up. The question in the present case was, not whether the judgment creditor had availed himself of all the benefits given by the acts, but whether the debtor had charged his land under the 13th section of the 1 and 2 Vict., c. 110, and it was immaterial what the creditor's rights were, as against third parties. We are, therefore, at a loss whether to attribute the remarks on registration to inadvertence on the part of learned judges, or to oversight on the part of reporters.

There now remains but one point in this case which seems to require notice, and it is this:—Admitting that breaches of covenants in the lease had been committed, and that the same were known, or partially known, to the lessor, would the subsequent receipt of money by the lessor, paid to him by the lessee as rent in arrear, but not accepted as such by the lessor, but received by him as *compensation* for occupation, be a waiver of the forfeiture of the lease ? This depended upon what took place on the 26th October, 1854, at an interview between Mr. Martelli, the

agent of the plaintiff, and Mr. Barnes, the agent of the defendant. At that interview a sum of money equal to the amount of rent due was produced. Mr. Barnes tendered the amount to Mr. Martelli, stating that he tendered to him the rent due, and that he did so without any condition or reservation. Mr. Martelli, on the other hand, said that he could not receive the money as rent due under an existing unforfeited lease, but that he was willing to accept it as compensation for the occupation merely, and without prejudice to the lessor's right of re-entry for breach of covenant. Mr. Barnes thereupon said that he assented to no such condition, that he tendered the money unconditionally, as rent due, and that as rent Mr. Martelli must take it or leave it. Mr. Martelli said that he understood what Mr. Barnes meant. Mr. Martelli shortly after took up the money, saying at the time of so taking it, that he took it as compensation for the occupation of the premises merely, and not as rent due under an existing unforfeited lease, and that he did not waive the lessor's right of re-entry, but expressly reserved it. No receipt was asked for or given. The Court of Queen's Bench which held that the lease had been forfeited by reason of the breach of the covenant not to encumber, held that, under the above circumstances, the forfeiture had been waived. The Lord Chief Justice, in delivering the judgment of the court, said, that there was an established maxim of law, that when money was paid it was to be applied according to the expressed will of the payer, not of the receiver. If the party to whom the money was offered did not agree to apply it to the expressed will of the party offering it, he must refuse it, and stand upon the rights which the law gives him. The court saw no reason why that maxim should not be applied to the transaction in question. Mr. Martelli might have refused to receive the money offered as arrear of rent, and then the plaintiff might have proceeded for the forfeiture; but Mr. Barnes who offered the money, told him that if the money was received, it was to be received and applied as rent; and under the circumstances, whatever words he might utter, when, acting by the authority of the plaintiff, he took up the money and carried it away, in point of law, he received it as rent, thereby waiving the forfeiture, and confirming the lease. In the course of the argument it had been urged that the case did not expressly find that the plaintiff, or Mr. Martelli, when he received the money, knew of all the warrants and judgments. The Court of Queen's Bench, however, held that, whether this were so or not, the plaintiff or his agent knew full well that the covenant had been broken by various charges and encumbrances, and the Court did not think the waiver was prevented by showing that this breach was somewhat

more extensive than the plaintiff was aware of when the rent was received. The Lord Chief Justice proceeded as follows:—"Suppose a farming lease, with covenants to keep the buildings in repair, and not to sell manure off the demised premises, with a clause of re-entry for breach of covenant, and the landlord knowing that both covenants had been broken by the tenant having allowed the roof of the dwelling-house to be uncovered, and by selling ten loads of manure off the farm, receives arrears of rent, we conceive that he could not do away with the effect of this act, as a waiver of the forfeiture, by showing that there was likewise a shed out of repair, or that the tenant had sold another load of manure off the farm, of which he had not been informed when the rent was received by him."

The Court of Exchequer Chamber being of opinion that no breaches of any of the covenants in the lease had been committed, expressed no opinion on the point of waiver. In the House of Lords, all the judges, with the exception of Mr. Justice Crompton, agreed in this, namely, that the acceptance of the money by Martelli, operated as a waiver of all supposed breaches of covenant (if any) which were known to him at the time. Channell and Martin (B.B.) thought that Martelli must be considered to have had notice of all the warrants of attorney, but that the forfeiture (if any) in respect of a breach of any covenant, of which he had no knowledge, had not been waived. Mr. Baron Watson did not think it made any difference whether *all* the judgments were known to Mr. Martelli or not, provided he was aware of any *one* of the registered judgments. Mr. Justice Williams thought the right of re-entry (if any) was waived by the plaintiff as to all breaches of which he had notice. Mr. Justice Wightman was of opinion that the right of re-entry had been waived, but did not express any very clear opinion as to whether the waiver extended to unknown as well as to known breaches.

Mr. Baron Bramwell thought that if the lessee had sent the rent in a letter, the lessor could not have kept the money, answering that he kept it, not as rent, but as compensation, and then afterwards say he had not received it as rent; and that here Martelli had no right to take this money, except on the terms on which it was offered to him. "It may seem a refinement; but, had Mr. Barnes given the money to Martelli, that is, put it into his hand, after the latter had refused to receive it as rent, I should have thought it not a receipt of rent, and not a waiver. But I cannot think it was a waiver of unknown breaches. . . . I think the judgment of the Court of Queen's Bench wrong in speaking of *this* breach. I think (if any) there were several breaches; that is to say . . . if giving a warrant of attorney was a breach,

each giving was a breach. In the case put in the Court of Queen's Bench, had the lessor released the breach in removing manure, no mention would be made of the quantity; nor would there be any identification of what was released or waived, except the act or breach generally. But suppose there had been two entirely distinct removals, one in one year and the other in another, and one only specifically released; or, suppose a release given for non-repair of the shed, or a waiver of forfeiture in respect of it, and afterwards a discovery that the house was in danger for want of internal repair, nothing would be waived or released except the breaches specified. I cannot, therefore, assent to this part of the judgment; and, in answer to the last question, I say that such breaches (if any) as were known were waived, and no others."

Mr. Baron Martin said: "Mr. Martelli appears to me to have laboured under a misapprehension both of fact and of law; he seems to have thought that upon a condition being broken, and the tenant continuing in possession, this state of things arose, that the landlord had a right of re-entry from the time of the condition broken, and that the tenant continuing in possession was liable to pay a compensation as for use and occupation, the measure of the amount being the rate of rent reserved by the lease. If he brought an ejectment, his title would accrue at and from the time of the breach, and he would be entitled to maintain, not an action for use and occupation, but one for mesne profits for the time intervening between the accruing of his title and his obtaining possession. So, also, if he entered without an ejectment, I apprehend his claim for compensation in respect of the wrongful occupation of his land from the time of the breach until the actual entry would be in the nature of a demand for mesne profit, and not for use and occupation, which, generally speaking, is founded on a contract express or implied; but, however this may be, I think it is clear that the reserved rent is not the measure of compensation. . . . There was, therefore, no such demand existing as Mr. Martelli seems to have thought; but whether or not, Mr. Barnes, the agent of the defendant, was in possession of the money, and it was his right to appropriate it, and pay it in what manner and for what demand he thought fit. Mr. Martelli was at liberty to take it or reject it at his pleasure; but if he took it, he, in my judgment, took it according to the will of the defendant as expressed by his agent at the time of payment, and that what he said to the contrary is immaterial. The maxim of law, as well as of reason and good sense, is '*non quod dictum sed quod factum est, inspicitur*.'"

Mr. Justice Erle thought that if the lessor had notice of

several breaches of one covenant, and waived them all, and afterwards discovered another breach of the same covenant, not differing in circumstances from the breaches which he had waived, the waiver would extend to such breach, though unknown at the time of waiver.

Mr. Justice Coleridge was of opinion that the right of re-entry, if any, was entirely waived by the plaintiff; or, speaking more accurately, that the plaintiff estopped himself from insisting on it, and he found this entirely on the circumstances disclosed in the special case. No distinction was to be made between breaches which Martelli knew of and those which he did not, because the substantial question between him and Barnes was this: Will you accept this payment as rent, and thereby acknowledge an existing lease or not? This question being raised, where it was clear Martelli considered there were one or more grounds on which a right of re-entry might be insisted on, and knew that Barnes meant to pay nothing unless it were accepted so as to set up the lease as good against all such rights, Mr. Justice Coleridge thought, if Martelli did accept the payment in such a way as to waive *any* rights, it must be taken that the acceptance would waive *all*.

Mr. Justice Crompton differed from the other judges on the point of waiver. In the course of his remarks he said: "Where a lessor has so conducted himself as to have bound himself conclusively as having treated the relation of landlord and tenant under the original lease as having existed between him and the lessee subsequently to the supposed forfeiture, he is said to have waived the forfeiture. The lessor in such case has elected, as he is entitled to do, to keep the reversion, instead of insisting on the forfeiture and determination of the lease. But where, as here, he always insists on the forfeiture, he cannot be deemed to have made any such election to keep the reversion. What is called a waiver is not so properly a forgiveness, or a condonation, or release of a breach of covenant, as an election to take one estate instead of another. Viewing it in this light, the question whether the lessor knows or not of any of the particular breaches, does not appear to me to be material, as the question really is, does he know or suppose that he has the election in consequence of some breaches, and does he elect still to keep the reversion? Considering it as an election, it certainly appears strange that he should be deemed to elect against his expressed determination communicated to the other party at the time, unless, indeed, his act is inconsistent with any other explanation. A receipt of rent, *eo nomine* as rent under the lease, at least if unaccompanied by any explanation, is an unequivocal act of

electing to keep the reversion ; so is a distress in cases where it can only be justified by the continuance of the tenancy. . The authorities appear to me to be in accordance with what seems to me the common-sense of the case, where the party refuses to receive the rent as such. . . . I think that, in order to operate as an election to keep the reversion, the money should, in the language of Parke J. in *Doe v. Pritchard* (5 B. and Ad. 780), be received as rent due under the lease. In the present case there was a direct insisting on the forfeiture, and there was a distinct refusal to consider the tenancy as subsisting. The rule of law, that payments are to be taken *in modo solventis*, is a rule of appropriation where there are two debts or demands, and a payment by the debtor, expressly in satisfaction of one demand, precludes the creditor from maintaining an action for that debt or demand, on the ground that it has not been paid; but that is a very different matter from his being bound to admit that such a demand did exist, when he claims the sum on a different footing. The rule does not appear to me to apply to a case where there is one sum due or claimed in one of two ways, so as to bind the party receiving the money to an affirmation of the existence of a fact which he is distinctly repudiating. In the present case, the plaintiff refused to receive the money as rent—refused to recognize the tenancy as existing, and insisted on the forfeiture. I think that he cannot, under such circumstances, be treated as electing to have the reversion of the tenancy, and as waiving the forfeiture.”

The observations of Lord Mansfield in *Doe v. Batten* (Cowp., 243), seem to support the view taken by Mr. Justice Crompton. The latter learned judge, in what we must designate his masterly judgment, seems to have discovered the true principles which should govern the law upon the point of waiver, and bring them moreover into harmony with common-sense. In the case of *Doe v. Batten*, a landlord gave notice at Lady-day to his tenant (who was tenant at will only) to quit at Michaelmas; the tenant held over, and the landlord, after bringing an ejectment, received a quarter's rent due at Christmas, and the question was whether this acceptance of rent was a waiver of the notice. Lord Mansfield observed “let us suppose the landlord had accepted this rent under terms, or made an express declaration that he did not mean to waive the notice, and that notwithstanding his acceptance or receipt of the rent, he should still insist upon the possession. Or suppose any fraud or contrivance on the part of the tenant in paying it. Clearly under such circumstances the plaintiff ought not to be barred of his right to recover. . . . In point of law, the mere acceptance of rent is not of itself a bar.” Upon

this authority the editors¹ of Smith's *Leading Cases* inserted in the note to *Dumpor's case* the following remarks:—"It is conceived that the mere receipt of subsequent rent does not, of its own proper force, operate as a waiver of the forfeiture. It is only evidence of the election of the lessor to retain the reversion and its incidents, instead of the possession of the land; and, as an election once made and expressed cannot be retracted (*quod semel placuit in electionibus amplius displicere non potest*, Co. Lit. 146 a), the receipt of subsequent rent as such, without more, binds the landlord by proving an election. But rent, to the amount of that reserved in the lease, may be received, under circumstances showing it to be paid and accepted merely as compensation for use of the land, and not with the intention of setting up the lease; nay, a contrary intention may be expressed at the time of its receipt. A receipt of rent under such circumstances would not, it seems, amount to a waiver of the forfeiture."—(1 Sm. L. C., 20, 3rd ed.)

Lord Wensleydale, in his judgment in *Croft v. Lumley*, observed, that as to the question of waiver he would only state, that he did not wish the opinion of those judges who thought the breach was waived to go forth with his apparent sanction. He entertained considerable doubt upon that question; it seemed to be a matter of fact rather than a matter of law. He was much disposed to concur with Mr. Justice Crompton on that point; but it was one the determination of which was not necessary for the decision of this case. Lord Cranworth subsequently remarked that he wished it to be understood that he gave no opinion as to the waiver.

The result of the case, then, is as follows:—The Court of Queen's Bench held that there had been a breach of the covenant not to encumber the lease, but that the consequent forfeiture had been waived, and that there had been no breach of any other covenant. The Court of Exchequer Chamber held that there had been no breach of any of the covenants in the lease, and this judgment was affirmed by the House of Lords.

¹ Mr. Justice Willes and Sir H. S. Keating.

Short Notes of New Books.

[*.* It should be understood that the notices of new works forwarded to us for review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent number, when their character and importance seem to require it.]

1. The Joint Stock Companies' Acts, 1856, 1857, and 1858, and the Bankers' Acts of 1857 and 1858, with Notes, &c. By T. H. Markham, Esq., Barrister-at-Law. London: Robertson.
2. The Divorce and Matrimonial Causes Acts of 1857 and 1858, by the same Author.

THE first requisite in an edition of an Act of Parliament is accuracy, the next completeness, the third compactness.

On opening our copy of Mr. Markham's edition of the "Divorce and Matrimonial Causes Acts," to examine a question as to trying causes by jury, and on referring to section 28 (page 14), we found it to be nonsense. Being, however, accustomed to read nonsensical sections in statutes, we thought it possible that the legislature might be responsible for unintelligibility in this instance. It is not so, however; but the carelessness of Mr. Markham and his printer have made the clause in question absurd. By interpolating the word "that" at the end of the clause, they have rendered what was clear just the reverse. The scanty notes appended to the sections do not exhibit more care than the printing of the text. The editor, for example, makes Sir C. Cresswell, at p. 18, talk (in *Curtis v. Curtis*) of the discretion of the court being "moulded by *decrees* into something like a system"—the word used, of course, being *degrees*. So, again, even the few lines of a note to sect. 38, owing to the defective punctuation, are rendered obscure. Such inaccuracy as we see throughout the few sheets which compose this "edition," certainly induces us to prefer to use, for any practical purposes, a copy of the statute printed by the Printer to the Queen's most Excellent Majesty.

Next, as regards the *completeness* of these half-pamphlet half-book editions which Mr. Markham passes through the press: to secure this attribute of a good edition, a good *index* is essential. If a man, bent on printing a statute with his name appended to it, has no valuable comment to make, or useful explanation to give, he might at least make an index, which occasionally might save time and trouble; but in this respect we regret that we cannot give Mr. Markham's efforts any commendation.

With respect to the third quality we mentioned—namely, *compactness*—this series of statutes claims considerable merit, and if one did not object to seeing for ever before one, and to carrying about these very ugly and vulgarly-covered books, they would be found portable enough. The ease with which these orange-coloured pamphlets can be removed from one's library is indeed their chief merit.

The design of collecting the Joint Stock Companies' Acts of 1856, 1857, and 1858, is a very good one; but the way in which it is carried out, does not inspire us with much confidence in the editorial part of the work. There is something in these pages generally loose and poor, always excepting certain attempts at jocularity, which are strained and poor.

Thus, at page 97, the reader sees a statute entitled "The Joint Stock Companies' Amendment Act, 1856," which turns out to be 20 & 21 Vict. c. 80, passed 25th August, 1857, and is a statute with one clause, enacting that the Joint Stock Companies' Acts of 1856 and 1857 shall not be deemed to repeal 7 & 8 Vict., c. 110, so far as regards Insurance Companies.

Mr. Markham thinks it always necessary to dedicate (and occasionally in indifferent English) his valuable volumes to great men, sometimes granting them for this purpose higher titles than they own. Baron Bramwell, *e. g.*, has been elevated temporarily to the peerage; and further, if we read the dedication aright in this instance, the author says (in inscribing his 114 pages of reprint of statutes, bound in orange-coloured canvass) that he has done *himself* the honour, &c., as a tribute of respect to the learned baron.

Defects in taste many can excuse in a book, so long as it is workmanlike and trustworthy; but hasty editions of Acts, we would observe, will not bring the reputation for these qualities to any bar-rister. Indeed, the habit of continually producing ephemeral and imperfect books must prove, we should think, as injurious in all respects to the professional man, as it is useless to the lawyer.

1. An Inquiry into the Law of Negro Slavery in the United States of America, to which is prefixed an Historical Sketch of Slavery. By Thomas R. R. Cobb of Georgia. Vol. I. Philadelphia: Johnson & Co., 1858.
2. The Law of Freedom and Bondage in the United States. By John Codman Hurd, Counsellor at Law. In two vols. Vol. I. Boston: Little, Brown, & Co., 1858.
3. A Treatise on the Law of Wreck and Salvage. By William Marvin, Judge of the District Court of the United States for the Southern District of Florida. Boston: Little, Brown, & Co., 1858.

WHATEVER may be the progress and condition of general literature and the study of pure science in America, one thing is certain, and as

remarkable as it is certain—that in works of jurisprudence they have attained to great excellence: one cause (out of several which we shall hereafter take an opportunity of discussing) is, that law-books are addressed to, and studied by other classes besides those strictly professional. Thus, Mr. Bishop, in dedicating the first volume of his work on Criminal Law (recently reviewed in this Magazine), “To the young men of the United States,” affirms that it is intended for their use as much as for the “veteran practitioners at the bar,” and “the venerable judges on the bench.” We see also, in many other valuable contributions to our law library issuing from the American press, strong evidence that the general public, as well as the professional lawyers, are readers and buyers of legal literature.

Whatever may be the reasons for this peculiar interest in jurisprudence in America, it is clearly of no recent origin; for Burke referred to it as a well-known fact in his time. He observed of that country, that there was probably no other in the world where the law was so “general a study. The profession itself is numerous and powerful; and in most provinces it takes the lead. The greater number of the deputies sent to the Congress were lawyers. But all who read—and most do read—endeavour to obtain some smattering in that science. I have been told by an eminent bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those on the law exported to the plantations. The colonists have now fallen into the way of printing them for their own use. I hear that they have sold nearly as many of Blackstone’s Commentaries in America as in England.”

The works of Mr. Cobb and Mr. Hurd, of which the first volume only in each case has as yet reached our hands, will demand when completed ample notice. At present we will not launch into the arguments upon which the learned authors have entered as to both the law and morality of slavery. The subject, however, which relates to international jurisprudence, which this subject involves, deserves consideration even by those who have wept over “Uncle Tom,” and shuddered over “Dred.”

Mr. Marvin’s volume on wreck and salvage is concerned to a considerable extent with the procedure of the courts of which he is one of the judges. The Florida reef—a coral chain of great danger to shipping—gives ample business to “wreckers,” who, not like our Cornwall barbarians thus designated in olden times, save annually to shipowners an immense property. Hence the court over which Mr. Marvin presides has much occupation within its jurisdiction. “Yet for the purpose of hearing and *deciding* all causes of admiralty and maritime jurisdiction, the court is always open. It often proceeds in salvage cases with great despatch, emphatically *velis levatis*. Frequently a ship is got off the reef by the wreckers, and brought into port in a condition which will allow her to proceed on her voyage without the delay of making repairs. In such cases it often occurs that the libel is filed one day, the master files a claim and answer the next, the court hears and decides the case the third, and the ship proceeds on

her voyage the fourth." So far, then, as despatch is concerned, such procedure is very admirable. Although, as we have stated, the particular rules and practice in the learned author's court occupy considerable space in this book, and it is addressed more especially to the local bar, yet, as it contains also the *principles* applicable to cases of salvage, as well as a large collection of illustrations of the general maritime law on this head, the use of the book may well extend beyond the above-mentioned circle. Shipowners, underwriters, and their legal advisers, will find much in Mr. Marvin's book to reward their perusal of it.

4. The Proposed New Reform Bill (22 & 23 Vict., Session 1859), with a Preface. London: Butterworths, 1859.

WE cannot refrain from drawing attention to this humorous production, especially as it is understood to emanate from the pen of a very able lawyer, who, in addition to his many accomplishments, possesses a genuine wit, which, on other occasions besides the present, he has employed for the instruction and amusement of the profession.

The author of the present statute, in his clever preface, explains the position of the three political parties in the House of Commons with respect to a Reform Measure. He says the policy of the late government "will evidently be, to wait for the measure of their opponents, in order that they may denounce it if too liberal, deride it if too conservative, and in any event endeavour to supersede it by a Bill of their own, which will be either more constitutional or more revolutionary, according to the nature of the Government Bill, and the existing state of public opinion."

With respect to the measure of the Government, we are in perfect darkness. "The Government have evidently been waiting for the public to declare what Reform they wanted. But the country having been resolutely tranquil and doggedly silent, except at the late meetings in the north got up to do the bidding of Mr. Bright, the Conservatives have been left to their own devices to frame what is termed a large and comprehensive scheme of Reform, or, in other words, a Bill for sweeping organic changes in the British constitution. There is certainly something odd in the idea of a Conservative minister quietly sitting down to such a task under such circumstances, and if it were not for the gravity of the situation, it would verge closely on the ludicrous. The great founder of Conservatism appears to have believed its fundamental principle to consist in yielding up all the past convictions of a life, under the stress of a sufficient 'pressure from without.' But to yield without the requisite pressure, appears to be a discovery of modern Conservatism which indicates the increased intelligence of the age we live in. Still the task of coolly attempting to supply all the shortcomings of the original Reform Bill must needs be an embarrassing one to the most advanced Conservative of the day, from old habits, old associations, and even from old principles; and it seems likely enough that the difficulty hitherto has been found insur-

perable, and that the great state secret has been so well kept, because the members of the Government (like the needy knife-grinder) had no story to tell."

As to Mr. Bright's Reform measure the author says, he being a possessor of the opinion and intentions of this great Reformer in common with the rest of the public, he has been able to frame the Bill now before us. He says of Mr. Bright, that "after emulating Rarey in the metropolis by reducing the most intractable Radicals to the tamest subjection—after surpassing the celebrated Zebra feat, by biting and bridling a Roebuck—he has since been starring in the north with a success which in some degree approaches that of the great Spurgeon himself in the zenith of his fame. Indeed, it may fairly be questioned whether, in a recent achievement at Glasgow, he has not even surpassed that renowned performer; for what English orator has ever before filled an enormous Hall with Scotchmen at an admittance fee of no less than sixpence for the democracy, and one shilling for the aristocratic holders of reserved seats? for, like the government which he reviles, the orator keeps all his best places for the aristocracy.

"As the leader of advanced Liberalism is pre-eminently a straightforward and plain-spoken man, it has been an easy task to frame from the great principles laid down in his copious speeches, both in and out of parliament, such a scheme of Reform as may probably satisfy himself and his disciples as a preliminary and temporary measure. It is not to be expected that all can be accomplished in a single Bill, which has to be carried through a corrupt and unreformed parliament.

"Some of the clauses of the following Bill are therefore framed in a spirit of compromise, for which allowance will more readily be made, when it is borne in mind that the great liberal leader himself has recently been betrayed, by the same spirit, into some strange slip-slop about Household or Ratepaying Suffrage; and that, while condemning all the other institutions of his country, he has spoken of parish vestries in a tone of veneration resembling that of Mr. Bumble, the beadle."

The Bill is entitled, "A BILL for an effectual Reform in Parliament, and for divers other necessary and useful Reforms." The following specimens of the draftsman's skill must suffice for our readers:—

"~~Whereas~~ the People of this Realm do not now enjoy and never have enjoyed any Liberty, but on the contrary thereof, the said People now are, and from time immemorial have been oppressed and trampled on by an insolent, overbearing, and tyrannical Aristocracy: ~~And whereas~~ a wide Measure of Reform is needed, but the said People by reason of their debased and enslaved condition are for the most part indifferent thereto: ~~And whereas~~ there is a select Body of Reformers who are anxious for an effectual Reform, but differ amongst themselves with respect to the Ballot, Manhood Suffrage, Electoral Districts, the Duration of Parliaments, a single or double Representative Chamber, the Abolition of the Peerage and Monarchy, and other minor Points of Detail: ~~And whereas~~ there is 'a considerable Number

of false, fraudulent and counterfeit Reformers, whose only object it is to deprive the People of a thorough and comprehensive Reform, and to delude them with practical or sham Reforms: ~~And whereas~~ all true Reformers, though differing on all other Points, agree in having entire Confidence in John Bright: ~~And whereas~~ John Bright hath entire Confidence in himself: ~~We it therefore enacted~~ by the Queen's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

"I. That this Act shall and may be cited and called for all Purposes as 'Bright's Reform Act, 1859.'

"II. ~~And be it further enacted~~, That from and after the passing of this Act, the Statute absurdly called Magna Charta shall be repealed as a musty Relic of Feudal Barbarism; and that the Acts commonly called the Bill of Rights and the Habeas Corpus Act shall also be repealed as antiquated Cheats of a base Oligarchy; and that the Act falsely called 'The Reform Act,' shall in like manner be repealed as a modern Whig Sham and Imposture.

"III. ~~And be it further enacted~~, That John Bright shall be, and he is hereby empowered to abolish the Aristocracy of this Country (including the House of Lords) as a Nuisance, and for that purpose he shall have and exercise all the Powers and Authorities of the 'Nuisances Removal Act, 1855.'

VII. ~~And whereas~~ a Parliament held at a former Period by another great Reformer and Protector of English Liberty was known and called by a Name which cannot be mentioned in a modern Statute: ~~We it therefore enacted~~, That the Parliament to be returned under this Act shall be called by such other Name as John Bright shall direct, the same being as near as may be to the said former Name, consistently with a due Regard to the Refinement of modern Times; and that the said Parliament shall sit for so long as may be convenient to John Bright.

"XV. ~~And whereas~~ a due Regard to the Public Safety requires that special Legislative Protection should be given to John Bright: ~~We it therefore enacted~~, That whosoever shall henceforth speak or write in Disparagement or Ridicule of John Bright, shall be guilty of Burglary;¹ and whosoever shall directly or indirectly speak or write in Praise of the British Constitution as it has heretofore existed, or in any manner expressly or impliedly refer to the Wisdom of our Ancestors, shall be guilty of a Misdemeanour as tending to the Disparagement of John Bright, and of 'Bright's Universal Suffrage.'

"XVI. ~~Provided always~~, and ~~be it further enacted~~, That except as hereinbefore expressly provided, the Queen's Most Excellent Majesty shall retain all her present Rights, unless and until John Bright shall otherwise direct."

¹ "Flat Burglary as ever was committed."—*Per Dogberry, J.*

The Postscript to the Preface of the second edition is very amusing :

“ SINCE the publication of the First Edition of this Bill, Mr. Bright has brought forward another Reform Bill, which has gone through a First Reading in a Legislative Assembly summoned and held by himself at Bradford ; and which, after a Second and Third Reading in the Newspapers, he probably intends should become the Law of the Land some time before the Meeting of Parliament. Of this new Reform Bill, all that requires to be said is, that a glance at its provisions will be sufficient to show that it is a mere preparatory measure, intended to pave the way for the more comprehensive enactments of the following Bill.”

We recommend the perusal of the “ Bill ” to all whose politics have not so spoiled their temper as to disable them to enjoy the humour of a clever *jeu d'esprit*.

Events of the Quarter.

MISCELLANEOUS.

EXAMINATION OF THE ACCUSED IN CRIMINAL CASES.

WE understand that Lord Brougham will, early in the ensuing season, re-introduce the Bill which he brought forward last year, enabling prisoners and defendants in criminal cases to be examined at their own option. This would be another great link in the chain, now nearly complete, of those improvements in the law of evidence which Lord Brougham has so perseveringly carried out—his advocacy of them dating more than thirty years back. There is no doubt that the measure we allude to will be, and ought to be, much canvassed before it pass into law. It has hitherto been received favourably by many whose opinions on such questions are entitled to weight. The balance of legal judgment indeed has, so far as we have had opportunity of learning, been propitious to this reform in our criminal jurisprudence. Lord Brougham, some weeks since, addressed a letter on the subject to Mr. Hastings, with which we have been favoured. Our readers will be interested in its perusal. It is as follows :—

"17th December, 1858.

"MY DEAR HASTINGS,—A late trial in which fraud was alleged, and the only evidence was that of the parties, gives rise to some important inferences relating to judicial procedure, and especially throws light upon the great question of allowing defendants to be examined in criminal cases if they choose—the subject of my last year's bill.

"Suppose this proceeding had been in form, as it was in substance criminal, the plaintiff alone could have been heard; and of all the grave doubts that now hang over the case, not one could have existed. But would a conviction have been at all satisfactory? Would an acquittal have been so? Certainly not; for this could only have proceeded upon a belief that the plaintiff had given false evidence; and yet there would have been nothing to impeach his credit. It really appears unquestionable, that shutting out the testimony of the defendant leaves the court and jury, in very many cases, to rely on mere conjecture, when the proof may be had. The court is in somewhat of the helpless state of which I spoke in the letter I lately sent upon the procedure in the divorce court—a procedure wholly defective for want of parties, *i. e.*, public officers; and from that want, often without the evidence which the due safety of the case requires, it may be said, any safety of it at all. That the court itself feels this helplessness I have good reason to believe; a like helplessness has, I know, been felt by judges in criminal courts, whatever objection they may occasionally have urged to the proposed extension to the 'Evidence of Parties Act.'"

One of the points which strikes forcibly those who frequent Westminster Hall, or peruse the reports of legal proceedings in the daily or weekly papers, is the prominent position at which the new court having "exclusive jurisdiction in causes matrimonial in England," has arrived. Much of the general interest no doubt arises from the nature of the subjects exposed before the august tribunal, which consist of scandals in society, amusing to the idle, and belonging to that class of folly, weakness, and wickedness of mankind, which fascinates the ill-controlled imagination of the ordinary newspaper-reader. The view of the misfortunes of others—especially if these assume a ridiculous shape—always forms a source of gratification to the minds of the vulgar; and this is more particularly the case, when the casualties detailed are those which belong to domestic life; for whilst any one *may* be exposed to them, each prides himself on his own escape through his own personal prudence and private virtue. Probably the large number of causes lately thrown into the "Divorce Court" arises from the fact that the facilities given for relief, has caused the stream which hitherto had been dammed up, by an obnoxious and corrupt procedure, to flow now far more rapidly than will hereafter be observed; nor do suitors at present quite comprehend the limits of the operation of the new law, and hence some cases are improperly brought forward. Legal advisers, however, will ere long have, in the excellent and consistent decisions of the judge ordinary, abundant means of exercising a discretion, as to when they may properly invoke the aid of the court.

Sir Cresswell Cresswell's judicial character has never appeared to greater advantage than at present. Many questions which are raised in dispute before the court, are of a very difficult character, and the authorities are oftentimes contradictory, anomalous, or unsatisfactory.

The judge ordinary, indeed, has on several occasions to which we shall hereafter take an opportunity to advert, already defined, simplified, and rendered intelligible for practical application, the law which he is called on to administer.

We would submit, however, that there is one point in the procedure of this court which is productive of more evil than good—we mean the too extensive use of juries. The Judge Ordinary (in *Marchmont v. Marchmont*) is said to have expressed himself inclined to order a jury in petitions for judicial separation whenever either party asks for it. In the first place, judging from general experience, and not only from particular flagrant instances, a jury is not always the best tribunal when the sole purpose is to discover truth and calmly investigate facts. The political and social uses of the jury system are sufficiently well established in England, and no doubt exist; but that particular classes of cases, especially where juries are selected from particular classes of men, are very properly tried before twelve individuals brought by chance together to confer on the matters laid before them. So, too, for the purpose of protecting a subject from harsh law, or persecution through the law, a jury is invaluable; but in a large proportion of cases, the party legally and morally entitled to a verdict would prefer, and does well to prefer, to bring his case before a capable

judge, than risk a verdict from the caprice of a jury. And it is nothing but the force of habit and power of prejudice which prevents more common resort to those provisions of the Common Law Procedure Act enabling a judge to decide issues *offact*.

We should be glad to believe that further experience of the business of the Divorce Court will induce the learned Judge Ordinary to modify or alter the partiality for juries which he expressed in *Ratcliffe v. Ratcliffe* (27 L. 761, and 1 Swa & Wist 216). "This is a singular case," he observed, "and I doubt whether I ought not to direct the issues to be tried before a jury. I have the power to do so, though neither of the parties may require it. I am inclined to think that in every case which has to be tried before the full court, in which there is likely to be any considerable controversy as to the facts, it would be desirable to have a jury. Amongst other advantages, there is a greater possibility of getting unanimity on disputed questions of fact from a jury *who can be locked up*, if they do not agree, than from the full court."

There is an excellent piece of irony veiled under the last words here quoted! But we do not conclude that the learned judge desires the locking-up principle to be applied to the bench of judges, when facts are tried before them: nothing, we are sure, could be more repulsive to the judge ordinary, or unjust to many members of the court, than to be shut up with their brethren till they agree! The effect would be just the reverse attributed to that of seeing brethren dwelling together in unity. Unanimity may be purchased at too high a price, and the absurd constraint now put upon jurymen differing among themselves will probably ere long be abandoned. Whether abandoned or not, we cannot help reiterating the hope that, for the credit of the administration of the law in the court, for matrimonial disputes, the interposition of juries may be seldom called for or allowed.

The business of the court, we may also remark, has been grievously retarded by the difficulty of obtaining a full court. In November last the occupation of the judges who should compose a full court, was such as to preclude a competent court being found. It was said "six or seven judges are about to go on the winter circuit, two are required for the *nisi prius* sittings of each of the Common Law Courts, and one or two must sit at Chambers." Some remedy for this inconvenience must at once be found, for the court is choked with business, and the arrears are stated to be frightful. There are obviously too great and diversified burdens imposed upon the members of the bench. Rumour has already been busy with appointments of new judges, which the necessary reinforcement of Sir C. Cresswell's court causes.

To return, however, to the burdens imposed upon juries, we must advert to the disgusting disputes brought before the court in the tipsy quarrelling of the parties in the case of *Marchmont v. Marchmont*, the trial of which lasted *eight* days. The learned judge who presided would surely have adjudicated more satisfactorily in this instance, if he had been independent of the twelve honest men who were unnecessarily kept from their daily business and duties, and who applied

for remuneration in respect thereof. Matters of prejudice, of individual feelings, of peculiar or personal experience, are more likely to influence the members of a jury in causes matrimonial, than in almost any other species of trial. Besides which, the evidence is evoked before them in more "sporting" and *nisi prius* (and therefore more objectionable) style, than if the mind, to be specially addressed, were that only of a practised, educated, and acute judge.

In another very recent case not yet reported (*Keats v. Keats*), the disadvantages of a jury were rendered conspicuous. One of the jurymen contending, as it would appear, that in all matters relating to such a commonplace affair as matrimony, his own experience and knowledge were quite as great as those of the judge; and in consequence he refused to accept the legal definition of a certain term which the latter expounded to the jury. This term was "condonation," which has received, at the hands of Sir C. Cresswell, a lucid and consistent interpretation.

As we have been referring to the working in some cases of the jury system, we may perhaps here draw the attention of our readers to two illustrations thereof, which have recently occurred in our courts. The first is that of Mr. Wellington Greville Guernsey, *alias* William Hudson Guernsey, who took away secretly a paper of great importance from the Foreign Office, and appropriated it. He has been pronounced by a British jury not to be a thief! Henceforward a felon who robs a government office of its goods and chattels, must be considered, we presume, when prosecuted, a "political victim," and, like other martyrs for a good cause, be acquitted with applause.

The next illustration we refer to is *Smith v. The Great Northern Railway Company*. This arose from a "railway collision," which was either a case of negligence on defendants' part, rendering them liable for adequate damages, or it was an unavoidable accident, owing to a tempest, entitling the defendants to a verdict. There was no alternative. The jury, however, persisted in finding for the plaintiff, damage *one farthing!* Lord Campbell refused to accept the verdict. The jury said they returned it *because* they could *not* agree! They were locked up till next morning and then discharged, Lord Campbell having taken the opportunity of lecturing them, and telling them that the verdict they had attempted to pass off on him was "contrary to law, justice, and common-sense!"

It is very doubtful whether Lord Campbell's refusing to accept such a verdict, and in locking up the unfortunate jurors, one of whom was suffering from a carbuncle, and was obliged to partake of sandwiches and port-wine before his hungry and angry fellows, was not also "contrary to law." The "justice and common-sense" of the learned judge's proceeding is also not quite obvious to every one.

Indeed, it will be, we are afraid, within the observation of those of our readers who frequent *nisi prius* and criminal courts, that the verdicts and conduct of juries have of late been any thing but satisfactory. On a recent occasion a wretched jury in the divorce court *applauded*, with encouraging cries of "hear, hear," the learned judge who was

addressing them. They promptly received a lesson from him upon their indecency, which will for ever enable them to draw a distinction between a vestry meeting and a jury-box. Popular applause in courts of justice has been not uncommon of late, and is not repressed, unfortunately, in all the courts of Westminster, as it is in that of Exchequer. Some excellent remarks, *e. g.*, having fallen from Baron Bramwell the other day, to his horror and indignation he was cheered! whereupon the learned judge is reported to have said to his admirers:—"If I find any persons disreputable enough to applaud in a court of justice, I will send them to prison. By a parity of reasoning, if they can applaud, the blockheads present may express their disapproval of what the judge says, and the court would be turned into a bear-garden."

Perhaps an inferior body of men are being drawn upon too exclusively. We are not alluding merely to the growing number of instances when jurors refuse to agree where there seems insufficient reason for such conduct; but other cases have recently come before the public eye of a very gross character. In the present term, *e. g.*, the jury, in a case of *Crooke v. Caunt*, were disorderly enough to smuggle beer, &c., into the retiring-room, and thus strengthened for their judicial functions, refused to return a verdict! Another example of irregularity was made the subject of a motion for attachment. The cause of and remedy for these mischiefs should be carefully considered.

An experiment of a winter assize has been tried on the Northern circuit. Some influential persons in the profession object to it. In principle, the innovation we think is right, and we therefore hope it will prove successful, and become generally adopted. The railways, postal system, and electric telegraph, have at least rendered inconveniences of travel and absence from home and Westminster Hall insignificant, compared with the hardships endured by the Bar and the rest of the assize functionaries, in the days when Copley, Scarlett, Brougham, and their contemporaries, travelled in two-horse chaises their weary distances at eighteenpence a mile, and eight miles an hour.

The prosecution of Charles Forbes, Comte de Montalembert, on 24th of November, and the subsequent proceedings, are events which, though peculiarly belonging to another country, ought not here to be passed over in silence. The charges were, as we understand, four. 1. That of exciting hatred and contempt towards the government. 2. Of attacking the principle of universal suffrage, and the rights and the authority which the emperor holds according to the constitution. 3. Of expressing contempt towards the laws. 4. Of endeavouring to excite the people to commit a breach of the peace. This fourth charge was found for the accused, the other three for the government.

The dicta of Lords Holt and Ellenborough are, in English courts,

often referred to to define sedition. In *R. v. Tutchin*, 5 St. Tr., 532, the first-named judge remarked, "If men shall not be called to account for possessing the people with an ill opinion of the government, no government can subsist; nothing can be worse to any government than to endeavour to procure animosities as to the management of it. This has always been looked upon as a crime, and no government can be safe unless it be punished." So Lord Ellenborough's judgment in *R. v. Burdett* (4 B. and Ald., 95), and *R. v. Cobbett* (see Holt on Libel, 114), may be noted. The effect of their judgment being, that if a publication be calculated to alienate the affections of the people by bringing the government into disesteem, whether the expedient be ridicule or obloquy, it is, legally speaking, seditious. No one who has read the refined satire and polished bitterness in Montalembert's pamphlet, "*Un Débat sur l'Inde au Parlement Anglais*," can doubt that it was, in this sense of the word, *seditious*. The author *did* mean to bring the government of the Emperor of France into contempt; and we believe, too, that no one doubts that such writings are dangerous to the present government. We apprehend the indignation in England, arising out of the proceedings in this *cause célèbre*, really is launched against the government because it is deemed a tyranny; and is, moreover, strong enough to indict writers who boldly and freely speak out their minds, but is too weak to permit opinions to be expressed when hostile to itself; in other words, the French government is hated because it is both dangerously strong and dangerously weak. The English government need not indict an English writer for sedition who should make unpatriotic comparisons between England and France. The French government, however, thinks it must take this course. Nevertheless, the lawyer will remember that there have been epochs in England's modern history, when indictments by government for conspiracy and sedition, have been quite as much prosecuted, and for no worse libels on laws and their administration, than those of Count de Montalembert.

Whether, under the circumstances, it was really necessary or unnecessary, well or ill advised, to prosecute M. de Montalembert, it is not our business to speculate. We know that either way it is unfortunate: if necessary for its preservation, then indeed the state is in a precarious condition; if unnecessary, it is by far too powerful, and in the latter case, it is mere wantonness of tyranny to persecute a hostile but harmless critic.

The appeal which Count de Montalembert carried on, in spite of the pardon attempted to be imposed upon him, relieved him partially from the consequences of the former sentence. Pardon, however, having been again brought into operation, the disastrous judicial triumphs of the Emperor of France have for the present terminated. The rumours of war and misunderstandings between the great European powers seem, for the present, to have drawn off attention from this trial, which, nevertheless, will be a memorable one in its effects on the public mind, and on the history of French institutions under the reign of Napoleon III.

PROCEEDINGS OF THE LAW AMENDMENT SOCIETY.

THE most important proceeding of this Society is, as we take it, the resignation of his office by the secretary, Mr. Hastings. This was announced at the meeting of the 17th Jan., 1859. Upon the zeal and intelligence of the responsible officer of an association like that of the Law Amendment, much depends. The activity, cohesion, and consistency, after the first enthusiasm and impulse of its formation are over, is contingent, to a great extent, on the direction and force brought to bear by the person who has the management of the *business* of the Society on his hands. The members in general, however anxious they may be to forward the common object, cannot attend to a large portion of the working of the machinery of an association; and, if it be left to them, the truth of the proverb, that "what is every man's business is no one's business," is immediately displayed. Not only, however, is it the fact, that associations must have officers for the purpose referred to, but in the case of the Law Amendment Society especially, the functions of the secretary can only be efficiently and successfully performed by one who knows how to deal with men of various classes, of hostile interests, and opposite and sometimes eccentric opinions. We know that we are only expressing the general sentiment of those who were called upon to hold communications with Mr. Hastings, in saying that, in all the relations of his office he evinced a readiness, activity, skill, and knowledge which, we are glad to know, the Society has promptly and fully acknowledged. Mr. Hastings has of himself largely contributed towards the increase of the scope of its operations, and the augmentation of its connections in various quarters; and under circumstances of difficulty he has met with great success, because he spared no labour, and employed his talents vigorously and heartily, for the cause he espoused.

For many reasons we regret that Mr. Hastings has judged it necessary to resign office; but the selection of Mr. Edgar to fill his place is judicious, and will make the loss to the Society of the late secretary less felt than might otherwise have been the case.

The case of *Davidson v. Gordon* in the Bankruptcy Court, was adjudicated on by Mr. Commissioner Goulburn on January 5, of the present year. While it involves no novel point of law, it exhibits very lax practice amongst commercial men with respect to "warrants," and other unsatisfactory conduct of parties connected with the two swindlers, who have been occupying so much public attention.

The collateral discussions on the dealings of Mr. Chapman, one of the partners of the discounting house of Overend Gurney, have excited much interest, but have not been remarkable for showing any spirit of candour or careful accuracy. The subject was too tempting for these qualities to flourish either in the speech-making or article-writing.

The commissioners said that Mr. Chapman "was before the court as a witness only;" and that he was "under great disadvantages, and that he had scarcely the fair play to which a man who is sought to be inculpated is entitled;" that he "had not an opportunity of cross-examining witnesses; and that his counsel could not be allowed to address the court in his favour." The commissioner then himself proceeded to convict the witness thus situated, of having "been an accessory after the fact to a most gross and wicked fraud." The reports in the daily papers of other parts of the judgment, are possibly not quite correct. As the commissioner admitted that the case of Mr. Chapman was not fully before him, and as we think the commissioner's judgment is not perfectly before us, we shall therefore withhold any further remark upon the subject at present.

APPOINTMENTS, &c.

Mr. Sergeant Wells, of the Norfolk Circuit, has been appointed to be a puisne judge of the Supreme Court at Calcutta, in the room of Sir Arthur Buller, retired.

Biggs Andrews, Esq., Q.C., has been appointed Commissioner of the Court of Bankruptcy for the Exeter District, in the room of Montague Baker Bere, Esq., deceased.

George Williams Sanders, Esq., Barrister, late Secretary to the Lord Justice Turner, has been appointed a Commissioner of the Court of Bankruptcy for the Birmingham District.

Sir W. B. Riddell, Bart., Recorder of Maidstone and Tenterden, has been appointed the County Court Judge of North Staffordshire, Circuit No. 26, in the room of R. G. Temple, Esq., deceased.

F. A. Carrington, Esq., of the Oxford Circuit, has been appointed to the Recordership of Wokingham, vacant by the resignation of Geo. Clive, Esq., M.P.

Richard Couch, Esq., of the Norfolk Circuit, has been appointed to the Recordership of Bedford, in the place of Mr. Sergeant Wells, resigned.

W. H. Adams, Esq., M.P., of the Midland Circuit, has been appointed to the Recordership of Derby, vacant by the decease of Mr. Balguy.

T. C. S. Kynnersley, Esq., Stipendiary Magistrate of Birmingham, has been appointed to be Recorder of Newcastle-under-Lyne, in the room of Sir Fortunatus Dwarria.

L. T. Wigram, Esq., Q.C., M.P., has been appointed Standing Counsel, and H. S. Lawford, Esq. has been appointed Solicitor to the recently created Indian Council.

Hilary Term, 1859.

Hunter Rodwell and Henry Hawkins, Esqrs., both of the Home Circuit, and G. M. Giffard, Esq., of the Chancery Bar, having been appointed Queen's Counsel, were in this Term called within the Bar.

APPOINTMENTS IN IRELAND.

The Solicitor-General for Ireland, Edmund Hayes, Esq., has been appointed a Judge of the Court of Queen's Bench, in the room of Mr. Justice Crampton, resigned; and Francis Fitzgerald, Esq., takes his seat on the Exchequer Bench, in the place of Mr. Baron Pennefather, resigned.

CALLS TO THE BAR.

Michaelmas Term, 1858.

GRAY'S INN.—Arthur Beetham and Herrmann Liebstien, Esqrs.

LINCOLN'S INN.—George Nathaniel Colt, (holder of a 'studentship'); Richard Harrington, (certificate of honour, first class); John Delaware Lewis; Loftus Adam Fitz-Wygram; George Woodford Lawrance; Thomas Edward Cliffe Leslie; Thomas Hughes Earle, Esq.; Fitzroy Kelly; Charles Ratcliff; James Ranken Fergusson; William Norris; George John Rust; Thomas Mullins, jun.; Francis Henry Law; Thomas Sanderson Furniss; Louis Rouillard; Arthur White; William Stebbing; George Grey; Robert Thomas Forster, and Richard Francis Morgan, Esqrs.

INNER TEMPLE.—Frederick Jenkins Abbott; Dominick Daly Ryan, (certificate of honour); Martin Bryan Stapylton; John Roberts; Francis John Headlam; Thomas Laurence Kington; Jacob Dirk Barry, Esq.; Samuel Danks Waddy; Alfred Young; James Quayle Fordati; Thomas Sirrel Pritchard; Edward Archer Wilde, jun.; Charles Stuart Cansdell; Edward Carlile Willoughby, and Thomas Spinks, Esqrs.

MIDDLE TEMPLE.—William Peresford; Thomas Spence; Leveson Lane; James Eardley Hill; Henry Felix John Recano; Simpson Rostron, and John Huish, Esqrs.

EXAMINATION OF STUDENTS OF THE INNS OF COURT.

At the Michaelmas Term Examination of the Students of the Inns of Court, held at Lincoln's Inn Hall, on the 29th and 30th October, and 1st November, 1858, the Council of Legal Education awarded to—

Frederick A. Philbrick, Esq., of the Middle Temple, a Studentship of Fifty Guineas per Annum, to continue for a period of Three Years.

Ebenezer Charles and Richard Harrington, Esqrs., both of Lincoln's Inn, Certificates of Honour of the First Class.

Timothy O'Brien O'Feely, Esq., of Gray's Inn; Gainsford Bruce, Esq., of the Middle Temple; Richard T. Martin, Esq., of the Inner Temple; Andrew Commins, Esq., of Lincoln's Inn; Francis Henry Law, Esq., of Lincoln's Inn; George Woodford Lawrance, Esq., of Lincoln's Inn; Charles Crompton, Esq., of the Inner Temple; Arthur M. Mitchell, Esq., of the Middle Temple; William Stebbing, Esq.,

of Lincoln's Inn ; Thomas Sirrel Pritchard, Esq., of the Inner Temple ; Charles Alexander Smith, Esq., of Gray's Inn ; Thomas Woodcock, Esq., of the Inner Temple ; Richard Searle, Esq., of the Middle Temple, and Alfred Smith, Esq., of Lincoln's Inn—Certificates that they have satisfactorily passed a Public Examination.

At the Hilary Term Examination, held at Lincoln's Inn Hall, on the 7th, 8th, and 10th January, 1859, the Council of Legal Education awarded to—

Montague Hughes Cookson, Esq., of Lincoln's Inn, a Studentship of Fifty Guineas per Annum, to continue for a period of Three Years.

James Anstie and William Ambrose, Esqrs., both of Lincoln's Inn, Certificates of Honour of the First Class.

Gateward Coleridge Davis, Esq., of the Inner Temple ; J. W. Hume Williams, Esq., of the Middle Temple ; Frederick Clifford, Esq., of the Middle Temple ; Joseph Fenwick, Esq., of the Inner Temple, and Eyre Lloyd, Esq., of the Inner Temple—Certificates that they have satisfactorily passed a Public Examination.

THE CIRCUITS.

The ensuing Spring Circuits of the Judges have been thus arranged :—

Home Circuit.—Wightman, J., and Martin, B.

Midland Circuit.—Lord Campbell, C.J., and Erle, J.

Norfolk Circuit.—Cockburn, C.J., and Pollock, C.B.

Northern Circuit.—Willes, J., and Byles, J.

Western Circuit.—Crowder, J., and Watson, B.

Oxford Circuit.—Crompton, J., and Channell, B.

North Wales Circuit.—Bramwell, B.

South Wales Circuit.—Hill, J.

Chester.—Bramwell, B., and Hill, J.

Williams, J., will remain in town as vacation judge.

NECROLOGY.

September.

17th. BROUGHTON, Robert, Esq., Solicitor, aged 34.

21st. DAY, John, Esq., Barrister ; acting Attorney-general of Hong-Kong, aged 40.

October.

11th. STANDEN, James Henry, Esq., Barrister ; Administrator-general of Bombay, aged 35.

31st. GANN, John Stephen, Esq., Solicitor, aged 41.

November.

- 4th. CHAPLIN, Edward, the Rev., M.A., many years Reader to the Hon. Society of Gray's Inn, aged 88.
- 6th. GIFFARD, Stanley Lees, Esq., LL.D., Barrister, aged 71.
- 6th. HARRISON, Richard, Esq., Solicitor, aged 79.
- 7th. STAMP, George, Esq., Solicitor, aged 51.
- 10th. BAKER, Alfred, Esq., Solicitor, aged 53.
- 11th. BUNCE, James, Esq., one of the Masters of the Queen's Bench.
- 12th. WATSON, Robert, Esq., Solicitor, aged 63.
- 15th. BARNES, John, Esq., Barrister, aged 71.
- 18th. BARLOW, Philip Bockett, Esq., Barrister, aged 54.
- 19th. BRIMACOMBE, W. H., Esq., Solicitor.
- 21st. BOLTON, Joseph Lines, formerly Deputy Clerk of Custodies and of Presentations, and latterly of the Office of the Accountant in Bankruptcy, aged 64.
- 25th. THEAKSTON, George H., Esq., Solicitor, aged 41.
- 25th. WELCH, Montagu Stuart, Esq., Barrister, aged 39.
- 26th. SALMON, W. R. D., Esq., Barrister.
- 26th. SHERER, Henry W., Esq., Barrister.

December.

- 5th. HARWOOD, Joseph U., Esq., Solicitor, aged 48.
- 6th. COLLIER, John R., Esq., Barrister, aged 28.
- 13th. BERE, Montague B., Esq., Commissioner of Bankrupts for the Exeter District, aged 60.
- 15th. COBB, James, Esq., Solicitor, aged 70.
- 16th. BALGUY, John, Esq., Q.C., Commissioner of Birmingham District Court of Bankruptcy, Recorder of Derby, and Chairman of the Quarter Sessions for the County of Derby, aged 76.
- 21st. WITHAM, Henry, Esq., of Lincoln's Inn, Barrister-at-law, J.P. for the County of Middlesex, and for sixteen years Deputy-assistant Judge of the Clerkenwell and Westminster Courts of Quarter Sessions, aged 66.
- 24th. JACKSON, William S., Esq., Solicitor.
- 25th. HYDE, Thomas, Esq., Solicitor, aged 52.
- 25th. PARKER, Joseph, Esq., Solicitor.
- 25th. WILKINSON, James John, Esq., Barrister, one of the Justices of the Court of Pleas of County Palatine of Durham, aged 78.

January.

- 2nd. HUGHES, Linton, Esq., Solicitor, Deputy Town-Clerk of Liverpool.
- 7th. RENDELL, Thomas L. T., Esq., Solicitor, aged 59.
- 9th. BRAY, Solomon, Esq., Solicitor, late Town-Clerk of Birmingham, aged 64.
- 12th. THORNTON, Henry A., Esq., Solicitor, aged 32.
- 22nd. HALLAM, Henry, Esq., the renowned Author of the "View of the State of Europe during the Middle Ages," &c., &c., aged 83. He was a Bencher of the Inner Temple.

List of New Publications.

Alderson—Selections from the Charges and other Detached Papers of Baron Alderson, with an Introductory Notice of his Life. By C. Alderson, Esq., Barrister. Post 8vo, 10s. 6d. cloth.

Chitty—On Bills of Exchange, Promissory Notes, Cheques on Bankers, Bankers' Cash Notes, and Bank Notes, with reference to the Law of England, Scotland, France, and America. By J. A. Russell and D. Maclachlan, Esqrs., Barristers. Tenth Edition. Royal 8vo, 28s. cloth.

Cox—Forms of Practical Proceedings in the Chambers of the Master of the Rolls and the Vice-Chancellors. By E. Cox. 12mo, 8s. boards.

Coote.—The Practice of the Court of Probate; namely, in the Common Form Business, by H. C. Coote, Proctor: and in Contentious Business, by T. H. Tristram, D.C.L., Advocate: with the Probate Court Acts of 1857 and 1858; the Rules, Fees, and Forms of 1857 and 1858; and an entirely new and complete collection of Terms. Second Edition. 8vo, cloth.

Lumley—The New Sanitary Laws: namely, the Public Health Act, 1848: the Public Health Act, 1858: and the Local Government Act, 1858: an Introduction, Notes, and Index: with an Appendix, containing the various Statutes referred to therein, and those which are incorporated therewith. By W. G. Lumley, Esq., Barrister. 12mo, 10s. cloth.

Markham—The Joint Stock Companies' Acts, 1856-7-8, and the Banking Acts of 1857-8, with Notes, Terms, References, Decisions, &c. By T. H. Markham, Esq., Barrister. 12mo, 3s. cloth.

May—A Practical Treatise on the Law, Privileges, Proceedings, and Usage of Parliament. By T. E. May, Esq., Barrister. Fourth Edition, revised and enlarged. 8vo, 31s. 6d. cloth.

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Reform—The Proposed New Reform Bill, 22 and 23 Vict., Session 1859, with a Preface. "The Bill, the whole Bill, and nothing but the Bill." Royal 8vo, 1s. sewed.

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Smith—A Compendium of Mercantile Law. By J. W. Smith, Esq., Barrister. Sixth Edition. By G. M. Dowdeswell, Esq., Barrister. Royal 8vo, 36s. cloth.

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